THE CONTINUED VIABILITY OF THE ACT OF STATE DOCTRINE IN FOREIGN BRANCH BANK EXPROPRIATION CASES

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INTRODUCTION

The social and political revolutions of the nineteenth and twentieth centuries frequently involved the expropriation[1] of property of United States citizens.[2] These expropriations ultimately produced extensive litigation in United States courts.[3] The act of state doctrine[4] often precludes United States courts from adjudicating these cases solely on the

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1. *See* BLACK'S LAW DICTIONARY 470, 522 (5th ed. 1979) (defining expropriation as the taking of private property by the state); *see also infra* notes 205-17 (discussing the legal issues concerning expropriations).

2. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401-06 (1964) (concerning the seizure of sugar following the Cuban revolution of 1959); Oetjen v. Central Leather Co., 246 U.S. 297, 299-301 (1918) (involving the seizure of animal hides during the Mexican revolution of 1913); Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854, 857 (2d Cir. 1981) (regarding the expropriation of the assets and liabilities of a United States bank following the fall of South Vietnam in 1975), *cert. denied*, 459 U.S. 976 (1982); Day-Gormley Leather Co. v. National City Bank, 8 F. Supp. 503, 504 (S.D.N.Y. 1934) (concerning the seizure of bank deposits following the Russian revolution of 1917).

3. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401-06 (1964) (concerning claims to a shipload of sugar expropriated after the Cuban revolution in 1959); Oetjen v. Central Leather Co., 246 U.S. 297, 300-01 (1918) (involving rights to animal hides seized during the Mexican revolution of 1913); American Banana Co. v. United Fruit Co., 213 U.S. 347, 352 (1909) (regarding title to lands expropriated after the succession of Panama from the United States of Colombia in 1903); Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854, 857 (2d Cir. 1981) (concerning claims for repayment of bank deposits expropriated immediately after the fall of Saigon to communist forces in 1975), *cert. denied*, 459 U.S. 976 (1982); Bernstein v. N.V. Nederlandische-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375, 375-76 (2d Cir. 1954) (involving a dispute over title to ships seized during the reign of National Socialism in Germany between 1933 and 1945).

4. Underhill v. Hernandez, 168 U.S. 250, 252 (1897). Chief Justice Fuller, speaking for a unanimous court, said:

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Id.; *see also infra* notes 61-62 and accompanying text (discussing the origins and development of the act of state doctrine).

merits of the litigants' legal claims.[5] Although the cases in which United States courts formulated the traditional act of state doctrine involved the expropriation of tangible property,[6] more recent act of state cases[7] involve the expropriation of intangible property, namely, deposits[8] held in foreign branches[9] of United States banks.[10]

In foreign branch bank expropriation cases, a United States bank, presented with depositor demands for repayment of expropriated deposits, invokes the act of state doctrine to prevent a court from adjudicat-

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5. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 398 (1964) (holding that the act of state doctrine proscribes United States courts from maintaining an action challenging the validity of a Cuban expropriation decree); Callejo v. Bancomer, S.A., 764 F.2d 1101, 1116 (5th Cir. 1985) (holding that the act of state doctrine precludes civil actions challenging the validity of Mexican exchange control regulations); *see infra* notes 61-94 and accompanying text (discussing the application of the act of state doctrine in United States courts).

6. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 398 (1964) (involving the expropriation of sugar loaded aboard a container ship anchored in Havana harbor); Ricaud v. American Metal Co., Ltd., 246 U.S. 304, 305 (1918) (involving the Mexican provisional government's seizure of lead bullion).

7. *E.g.*, Garcia v. Chase Manhattan Bank, N.A., 735 F.2d 645 (2d Cir. 1984); Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982); Trinh v. Citibank, N.A., 623 F. Supp. 1526 (E.D. Mich. 1985); Perez v. Chase Manhattan Bank, N.A., 61 N.Y.2d 460, 463 N.E.2d 5, 474 N.Y.S.2d 689, *cert. denied*, 469 U.S. 966 (1984).

8. *See* 12 C.F.R. § 204.2(a)(1)(i) (1987) (defining the concept of deposit). The Code of Federal Regulations defines a deposit as

> [T]he unpaid balance of money or its equivalent received or held by a depository institution in the usual course of business and for which it has given, or is obligated to give credit . . . to an account . . . which is evidenced by an instrument on which the depository institution is primarily liable.

Id. A deposit of money is a loan to the bank in which it is deposited. Miller, *Debt Situs and the Act of State Doctrine: A Proposal for a More Flexible Standard*, 49 ALB. L. REV. 647, 647 n.1 (1985). A deposit establishes a debtor-creditor relationship between a bank and its depositors. 1 W. SCHLICHTING, T. RICE & J. COOPER, BANKING LAW § 9.02(1) (1987) [hereinafter 1 W. SCHLICHTING]. A bank becomes indebted to its depositor for the amount of the deposit accepted. *Id.* The statement of the bank portrays this indebtedness as a liability. E. SYMONS & J. WHITE, BANKING LAW 188 (1985). This Comment uses the terms "liability" and "obligations" interchangeably to refer to the debt a bank owes a depositor.

9. *See* 12 C.F.R. § 211.2(h) (1987) (defining a foreign branch as "an office of an organization other than a representative office that is located outside the country under the laws of which the organization is established, at which a banking or financing business is conducted"); *see also infra* notes 45-54 and accompanying text (discussing the operations of the foreign branches of the United States banks).

10. *See* 12 U.S.C. § 21 (1982) (defining a United States bank as any institution authorized to engage in the business of banking). The United States Code limits the business of banking to discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; receiving deposits; buying and selling exchange, coin, and bullion; loaning money on personal security; and obtaining, issuing and circulating bank notes. 12 U.S.C. § 24(7) (1982). *But cf.* 1 W. SCHLICHTING, *supra* note 8, § 1.02(3) (noting that a universally applicable definition of a bank is not possible).

ing its refusal to honor the demands for repayment.[11] The bank argues that because the expropriation is an act of a foreign government performed within its own territory, United States courts cannot judge the validity or propriety of the governmental action.[12] A court must refrain from evaluating the validity of the expropriation.[13] Banks, therefore, argue that courts must view the state expropriation of the deposit as a collection of the debt owed the depositor.[14] Because the deposit creates a single debt between the bank and its depositor,[15] the collection by expropriation relieves the bank of any liability to make a second payment on the debt.[16] The act of state doctrine, therefore, is an essential component of a United States bank's defense against claims for repayment of expropriated deposits.

When a United States bank asserts this act of state defense, it assumes that the expropriation is a governmental act performed within the territory of the acting nation.[17] In situations involving intangible property, however, this assumption is not always valid. Frequently, the expropriated property is outside the territory of the expropriated nation at the time of the expropriation.[18] Determining the availability of the

11. Garcia v. Chase Manhattan Bank, N.A., 735 F.2d 645, 650-51 (2d Cir. 1984); Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854, 862-63 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982); Trinh v. Citibank, N.A., 623 F. Supp. 1526, 1536 (E.D. Mich. 1985); Perez v. Chase Manhattan Bank, N.A., 61 N.Y.2d 460, 463-66, 463 N.E.2d 5, 8-11, 474 N.Y.S.2d 689, 692-95, *cert. denied*, 469 U.S. 966 (1984).

12. *See* Perez v. Chase Manhattan Bank, N.A., 61 N.Y.2d 460, 466, 463 N.E.2d 5, 11, 474 N.Y.S.2d 689, 695 (accepting the argument of the bank that a confiscation is an act of a foreign sovereign within its own territory and is not reviewable in a United States court), *cert. denied*, 469 U.S. 966 (1984).

13. *See* Ricaud v. American Metal Co., Ltd., 246 U.S. 304, 309 (1918) (explaining the deference a United States court must afford an action of a foreign sovereign taken within the foreign territory); *see also* Oetjen v. Central Leather Co., 246 U.S. 297, 303 (1918) (same); American Banana Co. v. United Fruit Co., 213 U.S. 347, 357-58 (1909) (same); Underhill v. Hernandez, 168 U.S. 250, 253, (1897) (same).

14. *See* Perez v. Chase Manhattan Bank, N.A., 61 N.Y.2d 460, 466, 463 N.E.2d 5, 11, 474 N.Y.S.2d 689, 695 (holding that the Cuban expropriation of the plaintiff's certificates of deposit was equivalent to payment of the full amount of the certificates), *cert. denied*, 469 U.S. 966 (1984).

15. *See* 1 W. SCHLICHTING, *supra* note 8, § 9.02(1) (explaining the nature of the debtor-creditor relationship arising from a bank deposit).

16. *Id.*; *see* Garcia v. Chase Manhattan Bank, N.A., 735 F.2d 645, 652 (2d Cir. 1984) (Kearse, J., dissenting) (stating that after a debt is collected pursuant to a valid decree, the debt is extinguished).

17. Garcia v. Chase Manhattan Bank, N.A., 735 F.2d 645, 650 (2d Cir. 1984); Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854, 862 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982); Trinh v. Citibank, N.A., 623 F. Supp. 1526, 1536 (E.D. Mich. 1985); Perez v. Chase Manhattan Bank, N.A., 61 N.Y.2d 460, 464, 463 N.E.2d 5, 9, 474 N.Y.S.2d 689, 693, *cert. denied*, 469 U.S. 966 (1984).

18. *See* Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854, 862 (2d Cir. 1981) (holding that at the time of the expropriation decrees, the situs of the deposits was no longer Vietnam), *cert. denied*, 459 U.S. 976 (1982); Trinh v. Citibank, N.A.,

act of state defense requires consideration of the situs[19] of the expropriated deposits at the time of expropriation. If the situs of the deposit, at the time of the expropriation, is the expropriating nation, the act of state doctrine provides a United States bank with a defense against depositor demands for repayment of expropriated deposits.[20] Situs determination, therefore, is a critical component of foreign branch bank expropriation cases.[21]

There are three problems with the application of the current situs determination tests in foreign branch bank expropriation cases. Initially, each of the current situs determination tests are fundamentally inconsistent with the constitutional underpinnings of the act of state doctrine. Second, the federal circuit courts are split over the appropriate situs determination test. Finally, the current situs determination tests raise the possibilities of gross inequities in foreign branch bank expropriation cases.

Parts I and II of this Comment, respectively, discuss the international activities of United States banks and the development of the act of state doctrine. Part III discusses the shortcomings of the act of state doctrine in foreign branch bank expropriation cases. Part IV of this Comment evaluates recent legislative attempts to alter the traditional act of state doctrine. Finally, Part V presents two proposals designed to bring predictability and fairness to foreign branch bank expropriation cases.

I. INTERNATIONAL ACTIVITIES OF UNITED STATES BANKS

The decades after World War II witnessed the explosive growth of the multinational corporation.[22] United States corporations led the world trend toward business multinationalism.[23] As their corporate clients expanded their operations overseas, many large United States banks established international banking networks to serve the needs of

623 F. Supp. 1526, 1536 (E.D. Mich. 1985) (ruling that at the time of the confiscation decrees, the situs of the deposits was not Vietnam).

19. *See* BLACK'S LAW DICTIONARY, *supra* note 1, at 1244 (defining the situs of property as the specific location of the property).

20. Note, *Act of State: The Fundamental Inquiry of Situs Determination for Expropriated Intangible Property*: Braka v. Bancomer, S.N.C., 11 N.C.J. INT'L L. & COM. REG. 121, 124 (1986) [hereinafter Note, *Fundamental Inquiry*].

21. *Id.*

22. Glynn, *Multinationals in the World of Nations*, in THE MULTINATIONAL ENTERPRISE IN TRANSITION 60, 63 (P. Grob, F. Ghadar & D. Khambata 2d ed. 1984).

23. Jacoby, *The Multinational Corporation*, in THE MULTINATIONAL ENTERPRISE IN TRANSITION, *supra* note 22, at 3, 7.

their multinational clients.[24] This practice, coupled with the increasingly interdependent nature of the international monetary system, resulted in United States banks becoming leaders in international banking.[25]

As of the end of 1984, United States banks concentrated foreign operations in Western Europe[26] and the industrialized countries of the Pacific Basin.[27] To date, United States banks generally have been reluctant to expand their operations into developing countries.[28] The risks of political instability, and capricious government regulations or manipulations, inhibit United States banks from expanding into many developing nations.[29] Because United States banks are experiencing greater competition,[30] both at home and abroad, from Japanese,[31] British,[32] French,[33] and West German[34] banks, they must expand their international banking networks into countries that they have avoided in the past.[35]

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24. E. ROUSSAKIS, INTERNATIONAL BANKING: PRACTICES AND PRINCIPLES 10-11 (1983); P. OPPENHEIM, INTERNATIONAL BANKING 13 (1970).

25. *See* Am. Banker, Oct. 24, 1984, at 1, col. 1 (showing that in 1984, United States banks operated 2,246 foreign offices in over 100 countries). The total foreign assets of United States banks was $322.5 billion in 1984. *Id.*

26. *Id.* Approximately 33% of the foreign offices of United States banks are in the Federal Republic of Germany, the United Kingdom of Great Britain and Northern Ireland, Belgium, and Spain. *Id.*

27. *Id.* Approximately 15% of the foreign offices of United States banks are located in either Hong Kong, Australia, and Japan. *Id.*

28. U.S. DEP'T OF THE TREASURY, REPORT TO CONGRESS ON FOREIGN GOVERNMENT TREATMENT OF UNITED STATES COMMERCIAL BANKING ORGANIZATIONS 639 (1979) [hereinafter TREASURY REPORT]. Large United States banks, however, have shown a willingness to establish a limited presence in some less developed countries. *Id.*

29. *Id.* On the whole, developing countries impose harsher and more discriminatory restrictions than other nations. *Id.*

30. *See* V. MURO, WORLD BANKING HANDBOOK 20-23 (1984) (presenting a list of the largest international banks in the world).

31. *See* id. at 20 (illustrating through a series of tables that 5 of the 15 largest internationally active banks, based on total assets and number of foreign offices, are Japanese).

32. *See id.* at 23 (illustrating through a series of tables that 3 of the top 15 banks, based on total assets and number of foreign offices, in the world are British).

33. *See id.* at 21 (illustrating through a series of tables that three of the world's largest banks, based on total assets and number of foreign offices, are French).

34. *See id.* at 22 (illustrating through a series of tables that one of the most active international banks in the world, based on total assets and number of foreign offices, is a West German bank).

35. Comment, *Foreign Branches of U.S. Banks - A Proposal for Partial Suspension During Periods of Unrest*, 7 FORDHAM L. REV. 118, 119 (1983-1984) [hereinafter Comment, *Foreign Branches*]; *see* Am. Banker, July 28, 1983, at 10, col. 1 (summarizing United States bank activities in developing countries). Developing countries have started offering significant rates of return on investments, taxation incentives, and regulatory incentives to attract the capital, technology, and expertise necessary for industrial development. Note, *The Harvest of* Sabbatino: Vishipco Line v. Chase Manhattan

A United States bank can expand its international banking network in numerous ways. First, a United States bank can become internationally active without leaving the United States. For example, a United States bank can engage in international banking without establishing overseas facilities by creating an international department in its head office,[36] incorporating an Edge Act corporation,[37] establishing international banking facilities (IBFs),[38] or operating an export trading company.[39] Second, a United States bank can expand its international network by establishing overseas facilities. Overseas facilities available to

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Bank, 8 N.C.J. INT'L L. & COM. REG. 87, 87 (1982) [hereinafter Note, *Harvest of* Sabbatino]. United States banks that operate developed international banking networks now view the advantages of operating in developing countries as outweighing the risks of political instability created by economic and cultural upheaval.

Advantages that banks have experienced include increasing their competitiveness, exploiting incentives offered by the country to attract investment, and establishing themselves in a market that has great future growth potential. TREASURY REPORT, *supra* note 28, at 135-36. *Compare* Am. Banker, Oct. 24, 1984, at 1, col. 1 (detailing the foreign activities of United States banks) *with Countries in Trouble*, ECONOMIST, Dec. 20, 1986, at 69, 70 (indicating which countries are most likely to experience instability during the remainder of the decade). This comparison shows that United States banks have 195 offices in the countries most likely to experience political, social, or economic instability during the remainder of the decade. *Id.* It appears that the risks of political instability no longer deter United States banks from expanding into developing countries. As United States banks continue expansion into politically unstable countries the risks of foreign branch expropriations increase. *See supra* note 29 and accompanying text (explaining the tendency of developing countries to interfere arbitrarily with United States banking interests). To facilitate the overseas expansion of United States banks, it is necessary to eliminate the flaws inherent in the act of state doctrine in foreign branch bank expropriation cases. *See infra* notes 181-84 (explaining the flaws in applying the doctrine to foreign branch bank expropriations). The prospect of additional foreign branch bank expropriations makes an analysis of the application of the act of state doctrine in foreign branch bank expropriation cases an important issue for United States banks.

36. *See* P. OPPENHEIM, *supra* note 24, at 14-15 (describing the role of the international department of a United States bank).

37. 12 U.S.C. §§ 611-611a (1982); 12 C.F.R. § 211.4 (1987). An Edge Act corporation is a wholly owned subsidiary of a United States bank, established to engage in activities that are incidental to international business. J. BAKER, INTERNATIONAL BANK REGULATIONS 38 (1979). Edge Act corporations may not conduct domestic banking in the United States. P. OPPENHEIM, *supra* note 24, at 14.

38. International Banking Facility Deposit Act of 1981, § 102, 12 U.S.C. § 1813(l)(5)(B) (1982). IBFs allow a United States bank to take deposits from foreigners and make loans to support the foreign operations of their clients at any domestic office. E. SYMONS & J. WHITE, *supra* note 8, at 749. The deposits of an IBF are not subject to the reserve requirements the United States imposes on other deposits held within the United States. 12 C.F.R. § 204.8 (1987). Additionally, the deposits of an IBF are exempt from the interest rate limits imposed on deposits held within the United States. 12 C.F.R. § 217.6(a) (1987). IBFs may not conduct business with United States residents. E. SYMONS & J. WHITE, *supra* note 8, at 749.

39. 12 U.S.C. § 1843(c)(14)(F)(i) (1982). An export trading company provides foreign exchange and financing services to facilitate exports of United States goods or services. *Id.* § 1843(c)(14)(F)(ii).

United States banks include representative offices,[40] bank consortia,[41] foreign branches,[42] foreign subsidiaries,[43] and foreign affiliates.[44]

The foreign branch[45] is the most common form of overseas facility.[46] To establish a foreign branch, the United States bank must obtain permission from the Board of Governors of the Federal Reserve System[47]

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40. *See* E. ROUSSAKIS, *supra* note 24, at 16 (defining the establishment of a representative office as an interim step in the creation of a branch office). A representative office provides its clients with information on businesses in the host country, or the political or economic climate of the host country. *Id.* A representative office cannot provide its clients with the full range of banking services, such as deposit taking or extending credit. *Id.*

41. *See id.* at 25 (describing a bank consortia as a joint venture among banks of varying nationalities establishing a separate bank, known as the consortium bank, in the host country).

42. *See infra* note 45 (defining a foreign branch of a United States bank).

43. 12 C.F.R. § 211.2 (1987) (defining a subsidiary as an organization in which an investor, directly or indirectly, holds more than 50% of the voting securities).

44. 12 C.F.R. § 211.2(a) (1987) (defining an affiliate of an organization as any entity of which the organization is a direct or indirect subsidiary, or any direct or indirect subsidiary of the organization); *see* S. KHOURY, DYNAMICS OF INTERNATIONAL BANKING 77 (1980) (defining an affiliate as an organization in which an investor controls less than 50% of the voting securities).

45. 12 C.F.R. § 211.2(h) (1987) (defining a foreign branch as an office of an institution located outside the country under the laws of which the institution is organized).

46. Comment, *Foreign Branches*, *supra* note 35, at 119. Most banks prefer branches because they are flexible and cost efficient. TREASURY REPORT, *supra* note 28, at 269. Foreign branches allow the parent to raise funds abroad when United States regulations increase the costs of acquiring funds within the United States. E. ROUSSAKIS, *supra* note 24, at 9-13. The parent bank can manipulate the borrowing and lending policies of its branches so as to provide major domestic corporate clients with inexpensive funds. *Id.* at 30-33; E. SYMONS & J. WHITE, *supra* note 8, at 750-52.

Additionally, foreign branches allow the parent bank to exercise direct control over foreign operations. TREASURY REPORT, *supra* note 28, at 299. Citibank uses a matrix organization to control its international banking network. U.N. CENTRE ON TRANSNAT'L CORPS., TRANSNATIONAL BANKS: OPERATIONS, STRATEGIES AND THEIR EFFECTS IN DEVELOPING COUNTRIES 63 (1981) [hereinafter TRANSNATIONAL BANKS]. In a matrix organization, a foreign branch manager is accountable to a superior in charge of a particular type of transaction as well as to a superior in charge of the operations in the particular country. *Id.* at 63 n.19. Generally, these superiors reside in the home country of the bank. *Id.*

47. 12 U.S.C. § 601 (1982). Congress established the federal reserve system in 1913. Federal Reserve Act, ch. 6, § 1, 38 Stat. 251 (1913) (codified as amended at 12 U.S.C. § 221 (1982)). The Federal Reserve System is a network of twelve central banks to which most national banks belong and most state banks may belong. E. SYMONS & J. WHITE, *supra* note 8, at 27. The preamble to the original Act stated that the purpose of the Federal Reserve Act was to "furnish an elastic currency to afford means of rediscounting commercial paper [and] to establish a more effective supervision of banking in the United States." Federal Reserve Act, ch. 6, § 1, 38 Stat. 251 (1913), preamble.

The Board of Governors consists of seven members, appointed by the President and approved by Congress, who serve 14-year terms. Federal Reserve Act, § 10, 12 U.S.C. § 241 (1982). The Board of Governors establishes reserve requirements for member banks, reviews and approves the discount rate actions of regional federal reserve banks,

and comply with the applicable laws of the foreign country.[48] When the United States bank establishes a foreign branch, the laws and regulations of both the United States[49] and the foreign country[50] govern the operations of the foreign branch.

Although court opinions differ concerning the precise nature of the relationship between the parent bank and its foreign branches, courts generally consider the foreign branch a separate and distinct business entity.[51] Because modern banking transactions are complex, deposits

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and issues banking regulations. *Id.*

48. E. ROUSSAKIS, *supra* note 24, at 17.

49. 12 U.S.C. § 604(a) (1982) (authorizing the Board of Governors of the Federal Reserve System to regulate the powers that a foreign branch of a United States bank may exercise). The foreign branches of United States banks may not "engage in the general business of producing, distributing, buying or selling goods, wares, or merchandise," nor may they "engage or participate, directly or indirectly, in the business of underwriting, selling, or distributing securities." *Id.* Additionally, both the Board of Governors of the Federal Reserve System and the Comptroller of the Currency reserve the right to examine the books and records of foreign branches. *See* 12 U.S.C. § 325 (1982) (authorizing the Federal Reserve Board to examine the books and records of the foreign branches of state banks); *id.* § 602 (authorizing the Comptroller of the Currency to demand information concerning the foreign branches of a national bank). The United States banking system is a bifurcated system. E. SYMONS & J. WHITE, *supra* note 8, at 24-26. Currently, United States banks may receive either national charters pursuant to the National Bank Act of 1864 or state charters pursuant to state law. *Id.*

The United States, however, drafts its laws governing the overseas activities of United States banks to place those banks in a strong competitive position overseas. *Id.* at 745. Generally, Regulation Q, which places limits on the interest rate banks may pay on deposits, does not apply to the foreign branches of United States banks. 12 C.F.R. § 217.3(a) (1987). Regulation D, which mandates the percentage of deposits a bank must keep on hand to meet the depositor demands, is also inapplicable to the foreign branches of United States banks. *Id.* § 204.1(c)(5). In addition, the Federal Reserve Act excludes foreign branches of United States banks from paying FDIC contributions for deposits payable outside the United States. 12 U.S.C. § 1813(l)(5) (1982). When a domestic office explicitly guarantees the deposits of the foreign branch, however, those deposits are subject to the interest rate limitations and reserve requirements imposed pursuant to Regulations Q and D, respectively. Heininger, *Liability of U.S. Banks for Deposits Placed in Their Foreign Branches*, 11 LAW & POL'Y INT'L BUS. 903, 905 n.3 (1979). Governmental regulation of the domestic activities of United States banks indirectly costs United States citizens one billion dollars annually. M. WEIDENBAUM, BUSINESS, GOVERNMENT AND THE PUBLIC 69 (2d ed. 1981). Free from the costs these regulations impose, foreign branches are able to compete effectively in other countries. Logan & Kantor, *Deposits at Expropriated Foreign Branches of U.S. Banks*, 1982 U. ILL. L. REV. 333, 335.

50. FED. RESERVE BD., FEDERAL RESERVE BULLETIN 1123 (1918). Most foreign countries, however, do not supervise or examine the activities of banks operating within their territory as extensively as the United States. OFFICE OF THE COMPTROLLER OF THE CURRENCY, F.I.N.E. STUDY RESPONSES 134 (1976). Lesser developed nations have neither the expertise nor the governmental infrastructure to supervise their banking industry to the degree the United States does. *Id.*

51. United States v. First Nat'l City Bank, 321 F.2d 14, 20 (2d Cir. 1963); Pan-American Bank & Trust Co. v. National City Bank, 6 F.2d 762, 767 (2d Cir. 1925),

made at a branch office are payable on demand only at that branch.[52] When a branch office closes voluntarily or wrongfully refuses a demand for repayment, however, the parent bank is liable for the deposits of its foreign branch.[53] Thus, the liabilities as well as the assets of the branch are ultimately the property of the parent bank.[54]

II. THE ACT OF STATE DOCTRINE

A. BACKGROUND AND DEVELOPMENT

The act of state doctrine is a complex doctrine of law.[55] Uncertainty exists regarding the actual nature of the doctrine, its underpinnings, and its origins.[56] The act of state doctrine is a conflict of laws principle,[57] not a rule of international law.[58] The doctrine, however, is not

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cert. denied, 269 U.S. 554 (1925); Clinton Trust Co. v. Compañia Azucarera Central Mabay, S.A., 172 Misc. 148, 151, 14 N.Y.S.2d 743, 746 (Sup. Ct. 1939); Note, *Harvest of* Sabbatino, *supra* note 35, at 90-92; *see* 12 U.S.C. § 604a (1982) (stating that every national banking association operating foreign branches must maintain a separate ledger of losses and profits for each individual branch).

52. Sokoloff v. National City Bank of New York, 250 N.Y. 69, 81-82, 164 N.E. 745, 750 (1928); Murtaugh v. Yokohama Specie Bank Ltd., 149 Misc. 693, 694-95, 269 N.Y.S. 65, 67 (Sup. Ct. 1933); Bluebird Undergarment Corp. v. Gomez, 139 Misc. 742, 744-45, 249 N.Y.S. 319, 321 (Sup. Ct. 1931); Logan & Kantor, *supra* note 49, at 341; Heininger, *supra* note 49, at 934-44.

The rapid, complex nature of modern commercial and banking transactions necessitates such a rule. *See* First Nat'l City Bank v. IRS, 271 F.2d 616, 622 (2d Cir. 1959) (stating that the separate entity doctrine is a matter of commercial necessity), *cert. denied*, 361 U.S. 948 (1960). A branch must have the authority to hire and train employees, negotiate with local labor unions, clear checks with local clearing house associations, provide for the maintenance of its facilities, and print forms in compliance with local law. L. WEERAMANTRY & W. SCHLICHTING, BANKING LAW § 212.02 (1987).

53. Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854, 863 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982); Trinh v. Citibank, N.A., 623 F. Supp. 1526, 1533 (E.D. Mich. 1985); Heininger, *supra* note 49, at 975; Comment, *Foreign Branches*, *supra* note 35, at 126.

54. E. ROUSSAKIS, *supra* note 24, at 170; *see* TRANSNATIONAL BANKS, *supra* note 46, at 62-63 (detailing the control a parent bank exercises over its foreign branches). In the absence of arms-length dealings between the branch and its parent, the parent should be ultimately liable for the debts of its branch. First Nat'l City Bank v. IRS, 271 F.2d 616, 619 (2d Cir. 1959), *cert. denied*, 361 U.S. 948 (1960).

55. Wallace, *Introductory Remarks*, in ACT OF STATE AND EXTRATERRITORIAL REACH 4 (J. Lacey ed. 1983).

56. *Id.*

57. Jimenez v. Aristequieta, 311 F.2d 547, 557 n.6 (5th Cir.), *cert. denied*, 373 U.S. 914 (1962); Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845, 855 (2d Cir. 1962), *rev'd on other grounds*, 376 U.S. 398 (1964); RESTATEMENT (SECOND) FOREIGN RELATIONS LAWS OF THE UNITED STATES § 41 comment c (Tent. Draft No. 7, 1986); 45 AM. JUR. 2D *Int'l Law* § 83 (1969).

58. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 422 (1964) (stating that no existing "international arbitral or judicial decision suggests that international law prescribes recognition of sovereign acts of foreign governments"); J. STARK, IN-

unique to United States jurisprudence.[59] A number of the largest trading nations in the world apply some variation of the act of state doctrine.[60]

Supreme Court decisions in several cases involving disputed acts of foreign sovereigns have formulated the act of state doctrine.[61] The doctrine precludes United States courts from sitting in judgment of the acts of a foreign government performed within its own territory.[62]

TRODUCTION TO INTERNATIONAL LAW 124-25 (1977) (stating that the act of state doctrine is not a principle of international law).

59. *See* Note, *Act of State Doctrine - Limitations on* Sabbatino: *Non-Applicability of the Hickenlooper Amendment*, 23 U. MIAMI L. REV. 243, 244 n.9 (1968) (tracing the act of state doctrine back to 1354 and the writings of Bartolus Tractatus Repraessalium). The doctrine became firmly entrenched in Anglo-American law as early as 1674 in the English case of *Blad v. Bamfield*. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416 (1964) (citing Blad v. Bamfield, 36 Eng. Rep. 992 (1674)).

60. *See* Annotation, *Act of State Doctrine*, 12 A.L.R. FED. 707, 712-13 (1972) (stating that the United Kingdom, Austria, Belgium, France, the Federal Republic of Germany, Greece, Italy, Japan, and the Netherlands each have a concept similar to the United States act of state doctrine). *But see* Wallace, *supra* note 55, at 5 (stating that while the courts of many countries apply a doctrine of law which they refer to as an act of state doctrine, only the courts of the United Kingdom, Australia, and Canada have an act of state doctrine similar to the United States). British courts, however, will not apply the act of state doctrine in cases involving violations of international law. A.M. Luther v. James Sagor & Co., [1921] 1 KB 456. Because international law is part of British law, the refusal of a British court to challenge the propriety of a violation of international law is, in effect, sanctioning a violation of British law.

61. 45 AM. JUR. 2D *Int'l Law* § 83 (1969). The act of state doctrine first appears in United States jurisprudence in *Hudson v. Guestier*. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 415 n.17 (1964) (citing Hudson v. Guestier, 9 U.S. (4 Cranch) 293, 293-94 (1808)). For a chronology of Supreme Court cases developing the act of state doctrine, see generally L'Invincible, 14 U.S. (1 Wheat.) 238, 253 (1816) (determining that the seizure of a private vessel is a sovereign act not reviewable in a United States court); Underhill v. Hernandez, 168 U.S. 250, 252 (1897) (stating the traditional formulation of the act of state doctrine); Harris v. Balk, 198 U.S. 215, 222-23 (1905) (introducing the traditional jurisdiction over the debtor test for situs determination); Oetjen v. Central Leather Co., 246 U.S. 297, 303-04 (1918) (explaining for the first time that the act of state doctrine was based on principles other than international comity); United States v. Bank of New York & Trust Co., 296 U.S. 463, 466 (1936) (holding that decrees of a foreign government were worthy of extraterritorial effect because they were consistent with United States law and public policy); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 415 (1964) (stating that the act of state doctrine is applicable even if the actions of the foreign government violate international law). Decisions of the federal appellate courts have also contributed to the development of the United States act of state doctrine. *See generally* Callejo v. Bancomer, S.A., 764 F.2d 1101, 1123-24 (5th Cir. 1985) (introducing the incidents of the debt situs test); Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706, 715-16 (5th Cir.) (introducing the complete fruition test for situs determination), *cert. denied*, 393 U.S. 924 (1968).

62. Underhill v. Hernandez, 168 U.S. 250, 252 (1897). Although Chief Justice Fuller's formulation of the act of state doctrine appears unambiguous, certain terms used in the statement require a definition. A "state" is a "society of men united together for the purpose of promoting their mutual safety and advantage by combined strength." Keith v. Clark, 97 U.S. 454, 459 (1877); 45 AM. JUR. 2D *Int'l Law* § 13

When the actions of a foreign government affect the subject matter of litigation, "the details of the action or the merit of the result cannot be questioned, but accepted as a rule for their decision."[63] The act of state doctrine, therefore, is a threshold issue preclusion device that may deny a United States court subject matter jurisdiction over claims involving the propriety of the acts of a foreign sovereign.[64]

In many expropriation cases the decrees or actions of the foreign government are ambiguous.[65] United States courts, therefore, must frequently interpret the meaning of the foreign decrees to determine the precise nature and scope of the expropriation.[66] While the act of state doctrine precludes United States courts from considering the validity or propriety of a foreign expropriation decree, it does not prevent United

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(1969). States occupy a definite territory, are politically organized under one government, and engage in foreign relations. Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 293 F. Supp. 892, 909 (S.D.N.Y. 1968); 45 AM. JUR. 2D *Int'l Law* § 13 (1969). A typical state action for act of state purposes is the taking of private property by the government. RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 41 (Tent. Draft No. 7, 1986).

Generally, United States courts have employed the act of state doctrine to preclude judicial consideration of the acts of a foreign government only if the political branches of the United States have recognized that government as the de jure government of the state. Sokoloff v. National City Bank, 130 Misc. 66, 224 N.Y.S. 102 (Sup. Ct. 1927), *aff'd*, 250 N.Y. 69, 81, 145 N.E. 917, 918-19 (1928); RESTATEMENT (SECOND) FOREIGN RELATIONS LAWS OF THE UNITED STATES § 42 (Tent. Draft No. 7, 1986). On occasion, however, United States courts have held that although the United States political branches do not recognize a foreign government as the de jure government of a foreign state, the government may nevertheless have a de facto existence which is juridically cognizable. *See* M. Salimoff v. Standard Oil Co., 262 N.Y. 220, 186 N.E. 679 (1933) (holding the Soviet government was the sovereign power within Russia). In such cases, the act of state doctrine bars judicial consideration of challenges to the actions of the government. *Id.*

63. Ricaud v. American Metal Co., Ltd., 246 U.S. 304, 309 (1918).

64. Callejo v. Bancomer, S.A., 764 F.2d 1101, 1113-14 (5th Cir. 1985); Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371, 1380 (5th Cir. 1980); National Amer. Corp. v. Nigeria, 448 F. Supp. 622, 646 (S.D.N.Y. 1978), *aff'd*, 597 F.2d 314 (2d Cir. 1979).

65. *See* Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854, 861-62 (2d Cir. 1981) (holding that the decrees of the provisional government of Vietnam did not unequivocally indicate whether the National Bank of Vietnam assumed the liabilities of the banks whose assets the government had confiscated), *cert. denied*, 459 U.S. 976 (1982); Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706, 713-14 (5th Cir.) (noting that the pronouncements of the Cuban government did not clearly indicate the nationalization of the tobacco company in question), *cert. denied*, 393 U.S. 924 (1968).

66. *See* Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854, 861-62 (2d Cir. 1981) (ruling that the decrees of the provisional revolutionary government did not encompass the liabilities of the banks whose assets had been confiscated), *cert. denied*, 459 U.S. 976 (1982); Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706, 713-14 (2d Cir.) (holding that the Cuban government had not nationalized the tobacco company in question), *cert. denied*, 393 U.S. 924 (1968).

States courts from determining the scope of those acts or decrees.[67]

The act of state doctrine only bars judicial consideration of foreign actions committed within the territory of the foreign state.[68] United States courts will give effect to the acts of a foreign sovereign performed outside its territory only when the acts are consistent with the laws and public policy of the United States.[69] The laws and public policy of the United States,[70] however, are antithetical to the confiscation of private property without prompt, adequate, and effective compensation.[71] United States courts, thus, will not give effect to an uncompen-

67. Reavis v. Exxon Corp., 90 Misc. 2d 980, 987-88, 396 N.Y.S.2d 774, 779 (Sup. Ct. 1977); *see* Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854, 861-62 (2d Cir. 1981) (stating that the Vietnamese decrees did not encompass the liabilities of the expropriated branch bank), *cert. denied*, 459 U.S. 976 (1982). After deciding that the Vietnamese government did not assume the liabilities of the expropriated branch, the court held that the act of state doctrine did not preclude judicial consideration of claims involving those liabilities. Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854, 861-62 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982). The court in *Vishipco* ignores the fact that under communist ideology, commercial enterprises belong to the state. Note, *Harvest of* Sabbatino, *supra* note 35, at 93. Given this principle of communism, the court in *Vishipco* should have held that the government decrees extended to the branches' assets. *Id.*

68. Underhill v. Hernandez, 168 U.S. 250, 252 (1897). The "territorial limitations of the act of state doctrine embodies the considered judgment of the judicial branch that a foreign state can be said to have reasonable expectations of dominion only with respect to property located within its own boundaries." Libra Bank Ltd. v. Banco Nacional de Costa Rica, 570 F. Supp. 870, 884 (S.D.N.Y. 1983); *see infra* note 80 (discussing the relationship between the constitutional underpinnings of the act of state doctrine and a foreign state's expectations of dominion).

69. Republic of Iraq v. First Nat'l City Bank, 353 F.2d 47, 50-51 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966); Zwack v. Kraus Bros. & Co., 237 F.2d 255, 259 (2d Cir. 1956).

70. Republic of Iraq v. First Nat'l City Bank, 353 F.2d 47, 51 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966); Banco Nacional de Cuba v. First Nat'l City Bank, 270 F. Supp. 1004, 1009 (S.D.N.Y. 1967). Generally, United States laws and public policy prohibit the uncompensated taking of private property by the state. *See* U.S. CONST. amend. V (stating, "nor shall private property be taken for public use without just compensation"). Even though the fifth amendment only prohibits the taking of private property by the federal government, it is still symbolic of United States revulsion to the uncompensated confiscation of private property. Republic of Iraq v. First Nat'l City Bank, 353 F.2d 47, 51 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966). *But see* United States v. Pink, 315 U.S. 203, 231-33 (1942) (holding that upon recognition of the Soviet government as the de jure government of Russia, the confiscation of private property by the Soviet government became consistent with the laws of the United States). Because the confiscation decrees were consistent with the laws of the United States, the court gave them extraterritorial effect. *Id.*

71. State Department Press Release No. 630, Dec. 30, 1975, *reprinted in* 15 I.L.M. 186 (1976); 1 D.P. O'CONNELL, STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW 266-67 (1967). The obligation of the expropriating government to pay prompt, adequate, and effective compensation is based on the equitable principle of just compensation. *Id.*; *see also* H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 479-80 (1986) (describing prompt, adequate, and effective compensation as a general standard that lends to flexible application by expropriating states and courts).

sated expropriation of property situated outside the territory of the foreign state at the time of the expropriation.[72] Therefore, if an expropriated bank deposit is located outside the expropriating state at the time of the expropriation, the act of state doctrine does not preclude a United States court from adjudicating claims challenging the expropriation.[73] Therefore, the legal determination of the situs of the expropriated property at the time of the expropriation decree is a significant stage in the resolution of foreign branch bank expropriation cases.[74]

To determine the situs of property for act of state purposes United States courts must consider the principles underlying the act of state doctrine. Initially, the Supreme Court based the act of state doctrine on the principle of comity among nations.[75] Deferring to principles of international comity, United States courts applied the doctrine to avoid considering claims that would embarrass or offend another government.[76] As United States courts continued to apply the act of state doctrine, the beliefs regarding its underpinnings began to change.[77]

B. Three Judicially Created Exceptions

The act of state doctrine, while not constitutionally mandated, has constitutional underpinnings reflective of separation of powers princi-

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72. *See* Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854, 862-63 (2d Cir. 1981) (holding that the deposits in question were located outside the territory of Vietnam at the time of the expropriation decrees and, therefore, the act of state doctrine did not prevent United States courts from considering claims that required an examination of the decrees), *cert. denied*, 459 U.S. 976 (1982).

73. *Id.*

74. Note, *Fundamental Inquiry*, *supra* note 20, at 124.

75. Oetjen v. Central Leather Co., 246 U.S. 297, 304 (1918) (stating the act of state doctrine rests upon the highest considerations of international comity); American Banana Co. v. United Fruit Co., 213 U.S. 347, 352 (1909) (holding that the principle of comity of nations mandates the act of state doctrine). The Supreme Court defines international comity as

> [N]either a matter of absolute obligation on the one hand, nor a mere courtesy and good will on the other. But it is a recognition which one nation allows within its territory to the . . . acts of another, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protections of its laws.

Hilton v. Guyot, 159 U.S. 113, 163-64 (1894).

76. Oetjen v. Central Leather Co., 246 U.S. 297 (1918) (holding the act of state doctrine bars judicial consideration of claims resulting from the Mexican provisional government's seizure of cowhides). Judicial consideration of such claims would be an affront to the Mexican government. *Id.*; *see also* Ricaud v. American Metal Co., 246 U.S. 304 (1918) (holding that the act of state doctrine precludes judicial consideration of claims arising from the Mexican provisional government's seizure of lead bullion).

77. *See* Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918) (raising the possibility that the doctrine rests, at least in part, on separation of powers principles).

ples.[78] The doctrine symbolizes judicial recognition of the preeminence of the President to conduct foreign relations.[79] Because the judicial consideration of the acts of a foreign sovereign might frustrate the ability of the President to conduct foreign relations, United States courts refrain from adjudicating the acts of foreign sovereigns.[80] Despite the constitutional underpinnings of the act of state doctrine, United States courts habitually misapply the doctrine.[81] Additionally, not all United States courts accept the validity of the doctrine. In the past three decades, the judiciary has carved out at least three broad exceptions to the act of state doctrine.

1. The Bernstein Exception

The Bernstein exception is the oldest judicially created exception to

78. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964); *see also* Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 697 (1976) (recognizing the constitutional underpinings of the act of state doctrine); Banco Nacional de Cuba v. Chase Manhattan Bank, N.A., 658 F.2d 875, 881-82 (2d Cir. 1981) (acknowledging the separation of powers principle underlying the act of state doctrine).

79. Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 697 (1976); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426-27, 431-33 (1964); Garcia v. Chase Manhattan Bank, N.A., 735 F.2d 645, 651 (2d Cir. 1984); Banco Nacional de Cuba v. Chase Manhattan Bank, N.A., 658 F.2d 875, 881-82 (2d Cir. 1981); Banco Nacional de Cuba v. Farr, 383 F.2d 166, 180 (2d Cir. 1967).

80. Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 697 (1976); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 431-33 (1964); Banco Nacional de Cuba v. Chase Manhattan Bank, N.A., 658 F.2d 875, 882 (2d Cir. 1981). A United States court's consideration of the actions of a foreign state regarding the property at issue can only hinder or embarrass the President in the conduct of foreign relations when the court acts to frustrate the foreign nation's expectations of dominion over property. Libra Bank Ltd. v. Banco Nacional de Costa Rica, 570 F. Supp 870, 884 (S.D.N.Y. 1983). In determining whether judicial consideration of the actions of a foreign government would hinder or embarrass the President in the conduct of foreign relations, a United States court may consider any positions the executive branch articulates. Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516, 521 n.2 (2d Cir.), *cert. denied*, 473 U.S. 934 (1985). Any position the executive branch articulates does not bind the judiciary, however, and the determination of the applicability of the act of state doctrine is always a judicial question. *Id. But see* Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246, 252 (2d Cir.) (Clark, C.J., dissenting) (arguing that where the executive branch recognizes the validity of the act of a foreign state, courts are bound to observe the determination of the President), *cert. denied*, 332 U.S. 772 (1947); *see also* Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375, 376 (2d Cir. 1954) (stating the President had unambiguously indicated that it is the policy of the United States to undo the forced transfer of property belonging to the victims of Nazi persecution). In light of this policy statement, the court refused to apply the act of state doctrine to preclude its consideration of claims that challenged the validity of the acts of the Third Reich. *Id.*

81. *The International Rule of Law Act, 1981: Hearings on S. 1434 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 2, 22-24 (1981) [hereinafter *IRLA Hearings*] (statement of Professor Don Wallace, Director of the International Law Institute, Georgetown University Law Center).

the act of state doctrine.[82] Pursuant to the Bernstein exception, a United States court will not apply the act of state doctrine if the State Department informs the court that the executive branch believes the adjudication of the merits of a foreign sovereign's act will not inhibit the ability of the President to conduct foreign relations.[83] The Supreme Court, however, has never accepted the validity of the Bernstein exception.[84] The lack of Supreme Court acceptance, coupled with the reluctance of the State Department to issue Bernstein letters[85] significantly limits the scope of the Bernstein exception.[86]

2. *The Commercial Activities Exception*

The commercial activities exception is the second judicially created exception to the act of state doctrine.[87] A court must first determine

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82. *See* Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375, 376 (2d Cir. 1954) (holding that the clear expression of executive policy renders application of the act of state doctrine unnecessary). The plaintiff, a Jewish German, sued the Dutch holders of property that the Nazis confiscated during the Second World War. Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 173 F.2d 71, 72-73, 75 n.18 (2d Cir. 1949). Previously, the plaintiff unsuccessfully sued a Belgian corporation, also seeking recovery of property that the Nazis confiscated. Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246, 247 (2d Cir.), *cert. denied*, 332 U.S. 772 (1947). In this initial case, the act of state doctrine precluded the court from considering the validity of the confiscations. *Id.* at 249.

83. Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375, 376 (2d Cir. 1954). The letter from the State Department to the attorney for the plaintiff unequivocally stated the position of the executive branch that the application of the act of state doctrine in cases involving Nazi confiscations was unnecessary. 26 DEP'T STATE BULL. 984, 985 (1952).

84. *See* Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 706-11 (1976) (refusing to apply the act of state doctrine despite a letter from Monroe Leigh, the Legal Advisor to the Department of State). The State Department issued a letter indicating that a judicial determination of the legality of any Cuban act involved in the litigation would not inhibit the conduct of foreign policy. *Id.* at 710-11. Despite this letter, the Court held the act of state doctrine inapplicable for other reasons. *Id.* at 696-707; *see also* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972) (plurality opinion) (declining to apply the act of state doctrine). In *First National City Bank*, however, only Chief Justice Burger and Justices Rehnquist and White accepted the validity of the Bernstein exception. *Id.* at 762-70 (Burger, C.J., Rehnquist & White, JJ., plurality opinion). Justice Powell, while concurring in the result, rejected the exception. *Id.* at 774 (Powell, J., concurring in result only). Justice Brennan, joining with Justices Stewart, Marshall, and Blackmun in dissent, rejected the exception as being inconsistent with the reasoning of *Sabbatino*. *Id.* at 787-89 (Brennan, Stewart, Marshall & Blackmun, JJ., dissenting).

85. *See* Bazyler, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325, 369-70 n.274 (1986) (indicating the reluctance of the State Department to issue Bernstein letters). The State Department receives two or three requests for such letters annually. *Id.* As of 1986, the department had issued only seven Bernstein letters. *Id.*

86. *Id.* at 370.

87. Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 706 (1976). The com-

whether the state action at issue falls within the scope of the exception.[88] Where the foreign government acts in its sovereign capacity, United States courts must recognize foreign government actions taken within the foreign government's own territory.[89] When the foreign government acts in a proprietary capacity, however, the judiciary need not defer to the actions of the foreign government, and the act of state doctrine is inapplicable.[90] As with the Bernstein exception, however, the United States Supreme Court has not universally accepted the commercial activities exception to the act of state doctrine.[91]

3. *The Treaty Exception*

The treaty exception is the third judicially created exception to the act of state doctrine.[92] This exception requires a United States court to reject application of the act of state doctrine when the challenged actions of a foreign state are the subject of a treaty between the United States and the acting foreign nation.[93] As with the other judicially created exceptions to the act of state doctrine, however, United States courts have not enthusiastically embraced the treaty exception.[94]

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mercial activities exception to the act of state doctrine results from the growing participation of foreign sovereigns in the international commercial markets. *Id.* at 705. The commercial activities exception is consistent with the constitutional underpinnings of the act of state doctrine. *See id.* at 704-07 (stating that judging the merits of the commercial dealings of the foreign state will not offend that nation). Because a court judging the commercial dealing of a foreign sovereign does not offend that sovereign, its exercise of jurisdiction will not inhibit the ability of the President to conduct foreign relations. *See supra* note 80 (describing the dependence of jurisdiction upon the President's need to conduct foreign policy).

88. *See* Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 696 (1976) (stating that the judiciary should define the outer limits of the act of state doctrine).

89. *See id.* at 704-06 (holding that when a foreign government exercises powers that are peculiar to sovereigns, the act of state doctrine precludes judicial examination of the actions of the foreign government).

90. *Id.* at 704. When a foreign government engages in activities in which any private citizen can engage, the act of state doctrine does not bar judicial evaluation of those actions. *Id.* at 704, 707.

91. *See id.* at 715 (Stevens, J., concurring) (declining to recognize the commercial activity exception to the act of state doctrine); *id.* (Powell, J., concurring) (stating that even in situations involving purely political acts, the judiciary must decide whether foreign policy objectives require judicial abstention). Justices Brennan, Stewart, and Blackmun joined Justice Marshall in attacking the creation of a commercial activities exception to the act of state doctrine. *Id.* at 716-37 (Marshall, Brennan, Stewart & Blackmun, JJ., dissenting).

92. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).

93. *Id*; *see* Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia, 729 F.2d 422, 428 (6th Cir. 1984) (citing the 1953 Treaty of Amity between the United States and Ethiopia as justification for declining to apply the act of state doctrine).

94. Bazyler, *supra* note 85, at 371; *see* International Ass'n of Machinists & Aero-

III. SHORTCOMINGS OF THE ACT OF STATE DOCTRINE IN FOREIGN BRANCH BANK EXPROPRIATION CASES

United States banks frequently raise the act of state doctrine in defending against depositor demands for repayment of expropriated deposits.[95] An essential component of the defense is the realization that a deposit represents a single debt that the branch owes its depositors.[96] A foreign government expropriation of the assets and liabilities of a branch effectively represents a collection of the debt the branch owes its depositors.[97] A United States bank defending against depositor demands for repayment of expropriated deposits argues that because the expropriation took place within the territory of the expropriating nation, a United States court cannot challenge the validity of the governmental collection of the debt that the branch owed the depositor.[98] This prior collection of the debt, the bank argues, relieves the bank of liability to satisfy the same debt a second time.[99]

The act of state doctrine, however, precludes only judicial consideration of foreign expropriations that occur within the territory of the expropriating nation.[100] The territorial limitation of the act of state doctrine makes it applicable in foreign branch expropriation cases only if the situs of the expropriated deposits, at the time of expropriation, is the expropriating nation.[101] Current situs determination methods, however, are inconsistent with the constitutional underpinnings of the act of

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space Workers v. Organization of Petroleum Exporting Countries (OPEC), 649 F.2d 1354, 1360 (9th Cir. 1981) (rejecting the treaty exception to the act of state doctrine), *cert. denied*, 454 U.S. 1163 (1982). The broad exceptions to the act of state doctrine — the Bernstein exception, the commercial activity exception, and the treaty exception — are all fundamentally inconsistent with the case-by-case approach to the act of state doctrine the court adopted in *Sabbatino*. Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 728 (1976) (Marshall, J., dissenting). This inconsistency explains the reluctance of the Supreme Court to embrace these exceptions to the act of state doctrine.

95. *See supra* note 11 (citing cases in which banks raised the act of state defense).

96. *See* 1 W. SCHLICHTING, *supra* note 8, § 9.02(1) (explaining the nature of the debtor-creditor relationship arising from a bank deposit).

97. *See* Perez v. Chase Manhattan Bank, N.A., 61 N.Y.2d 460, 466, 463 N.E.2d 5, 11, 474 N.Y.S.2d 689, 695 (holding that the Cuban expropriation of the plaintiff's certificates of deposit was equivalent to payment of the full amount of the certificates), *cert. denied*, 469 U.S. 966 (1984).

98. *See* Perez v. Chase Manhattan Bank, N.A., 61 N.Y.2d 460, 466, 463 N.E.2d 5, 11, 474 N.Y.S.2d 689, 695 (accepting the argument of the bank that a confiscation is an act of a foreign sovereign within its own territory and is not reviewable in a United States court), *cert. denied*, 469 U.S. 966 (1984).

99. *See* Garcia v. Chase Manhattan Bank, N.A., 735 F.2d 645, 652 (2d Cir. 1984) (Kearse, J., dissenting) (stating that once a debt is collected pursuant to a valid decree, the debt is extinguished).

100. *See supra* note 68 and accompanying text (discussing the territorial limitations of the act of state doctrine).

101. Note, *Fundamental Inquiry*, *supra* note 20, at 124.

state doctrine. Additionally, courts are split over which of these flawed tests is the appropriate situs test and apply different tests in similar factual settings. Finally, regardless of which flawed situs test a court uses, inconsistent application of the act of state doctrine can create gross inequities in foreign branch expropriation cases.

A. SITUS DETERMINATION

A debt is an intangible asset that has no actual, physical location.[102] Determining the situs of intangible property is a difficult task involving abstract principles.[103] Intangible property can only be 'located' within a single jurisdiction as a matter of legal fiction.[104] For act of state purposes, courts consider a debt located within the state that has the ability to enforce or collect the debt.[105] The ability of a state to enforce or collect a debt depends on jurisdiction over the debtor.[106] To determine whether the expropriating state has jurisdiction over the debtor for act of state purposes, United States courts employ one of three legal fic-

102. Garcia v. Chase Manhattan Bank, N.A., 735 F.2d 645, 651 (2d Cir. 1984) (Kearse, J., dissenting); Perez v. Chase Manhattan Bank, N.A., 61 N.Y.2d 460, 476-77, 463 N.E.2d 5, 11-12, 474 N.Y.S.2d 689, 696-97 (Wachtler, J., dissenting), *cert. denied*, 469 U.S. 966 (1984). Where an instrument is proof of a proprietary interest in intangible property, such as a certificate of deposit or an account statement, courts do not consider the location of the debt to be the physical location of the instrument evidencing the interest in the intangible asset. 5 MICHIE ON BANKS AND BANKING § 326a (1983). The document merely represents a debt, or the intangible property; it is not the property itself. *Id. Contra* von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1140 (1966) (stating that where a document embodies rights to intangible property, courts have held that the location of that document within the territory of a nation establishes the right of that nation's courts to exercise jurisdiction).

103. Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706, 714 (2d Cir.), *cert. denied*, 393 U.S. 924 (1968). The situs of intangible property may be one place for tax purposes, another place for venue, and yet another place for estate tax purposes. *Id.* at 714-15.

104. *See* Perez v. Chase Manhattan Bank, N.A., 61 N.Y.2d 460, 476, 463 N.E.2d 5, 11, 474 N.Y.S.2d 689, 696 (Wachtler, J., dissenting) (stating that because intangible property has no real physical existence, determining the situs of the property is not a question of fact), *cert. denied*, 469 U.S. 966 (1984). Courts devise and apply fictitious tests to determine the situs of the intangible property. *Id.*

105. Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 689-90 (1976); Harris v. Balk, 198 U.S. 215, 222-23 (1905); Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854, 862 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982); United Bank Ltd. v. Cosmic Int'l, Inc., 392 F. Supp. 262, *aff'd*, 542 F.2d 868, 873 (2d Cir. 1976); Trinh v. Citibank, N.A., 623 F. Supp. 1526, 1535 (E.D. Mich. 1985); Perez v. Chase Manhattan Bank, N.A., 61 N.Y.2d 460, 470, 463 N.E.2d 5, 10, 474 N.Y.S.2d 689, 692, *cert. denied*, 469 U.S. 966 (1984).

106. Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 689-90 (1976); Harris v. Balk, 198 U.S. 215, 222-23 (1905); Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854, 862 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982); Trinh v. Citibank, N.A., 623 F. Supp. 1526, 1536 (E.D. Mich. 1985).

tions: the domicile test, the complete fruition test, or the incidents of the debt test.[107]

1. Domicile Test

In *Harris v. Balk*,[108] the Supreme Court ruled that a state has jurisdiction over a debtor whenever a creditor can effect service of process on the debtor personally through the judicial mechanism of the state.[109] After noting that the ability of a state judiciary to effect personal service on a debtor requires that the debtor be within the territorial limits of the state,[110] the Court in *Harris* formulated the traditionally accepted rule that a state has jurisdiction over a debtor only when the debtor is actually present within the state.[111] As the debtor moves from state to state, so does the situs of the debt owed the creditor.[112] A court utilizing the domicile test in a foreign branch expropriation case will hold that the expropriating country is the situs of the expropriated deposit, and the act of state doctrine applies if the branch is still operating in that country at the time of the expropriation.[113] If the branch has ceased operation, however, the expropriating country is not the situs of the deposits and the act of state doctrine will not apply.[114]

The domicile test of situs determination has recently come under in-

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107. *See infra* notes 108-63 and accompanying text (discussing the legal tests United States courts use to determine the situs of intangible property).

108. Harris v. Balk, 198 U.S. 215 (1905).

109. *Id.* at 221-22.

110. *Id.* at 221.

111. *See id.* at 222-23 (holding that where the debtor, a resident of North Carolina, was actually present within the territory of Maryland, Maryland had jurisdiction over the debtor); Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854, 863 (2d Cir. 1981) (holding that because Chase had entirely ceased operations in Saigon, it no longer maintained a presence in Vietnam, and was not subject to the jurisdiction of the Vietnamese courts), *cert. denied*, 459 U.S. 976 (1982); Republic of Iraq v. First Nat'l City Bank, 353 F.2d 47, 51-53 (2d Cir. 1965) (holding that where the trust company in possession of the property had no offices or any other presence in Iraq, Iraq did not have jurisdiction over the debtor trust company), *cert. denied*, 382 U.S. 1027 (1966).

112. Harris v. Balk, 198 U.S. 215, 222 (1905).

113. *See* Perez v. Chase Manhattan Bank, N.A., 61 N.Y.2d 460, 474-77, 463 N.E.2d 5, 10-11, 474 N.Y.S.2d 689, 695-97 (holding that because the Cuban branches of Chase Manhattan were open at the time of the expropriation, the situs of the plaintiff's certificates of deposit was Cuba), *cert. denied*, 469 U.S. 966 (1984). The act of state doctrine relieved Chase from having to make a second payment on those certificates. *Id.*

114. *See* Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854, 863 (2d Cir. 1981) (holding that because Chase had entirely ceased operations in Saigon, it no longer had a presence in Vietnam, and was not subject to the jurisdiction of Vietnam), *cert. denied*, 459 U.S. 976 (1982). The situs of the deposits was not Vietnam, and the act of state doctrine did not apply. *Id.*

tense scrutiny and criticism.[115] The test is unduly rigid and mechanical,[116] and yields unfair results between private litigants.[117] Additionally, the domicile test is inconsistent with the constitutional underpinnings of the act of state doctrine.[118]

Even though the domicile test of situs determination enhances predictability in expropriation cases,[119] it creates an awkward situation for banks operating foreign branches. During times of instability and social turmoil, a United States bank with branches in an unstable country must elect whether to close those branches or continue operations. If the bank chooses to continue its foreign operations, it places the safety of its foreign employees in jeopardy.[120] If the bank closes its branches, however, and the foreign sovereign expropriates assets and liabilities of the branches, the parent bank is unable to avail itself of the act of state defense[121] and is exposed to double liability.[122] Therefore, the domicile

115. *See* Note, *Fundamental Inquiry*, *supra* note 20, at 125 (indicating that as a result of deficiencies in the traditional domicile test, courts have recently held that thay may base an exercise of jurisdiction over a debtor on factors other than domicile).

116. Libra Bank Ltd. v. Banco Nacional de Costa Rica, S.A., 570 F. Supp. 870, 884 (S.D.N.Y. 1983).

117. Perez v. Chase Manhattan Bank, N.A., 61 N.Y.2d 460, 479, 463 N.E.2d 5, 14, 474 N.Y.S.2d 689, 698 (Wachtler, J., dissenting), *cert. denied*, 469 U.S. 966 (1984).

118. Libra Bank Ltd. v. Banco Nacional de Costa Rica, S.A., 570 F. Supp. 870, 884 (S.D.N.Y. 1983). In determining the threshold question of whether the confiscating country can exercise jurisdiction over the debtor, a United States court may violate the separation of powers principles underlying the act of state doctrine. Perez v. Chase Manhattan Bank, N.A., 61 N.Y.2d 460, 474-75, 463 N.E.2d 5, 12, 474 N.Y.S.2d 689, 695-96 (Wachtler, J., dissenting), *cert. denied*, 469 U.S. 966 (1984). Answering the threshold question may result in the court undermining a position the President had previously or secretly taken, thereby hindering the President in the conduct of foreign relations. *Id.* at 476-77, 463 N.E.2d at 12, 474 N.Y.S.2d at 696.

119. *See* Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854, 863 (2d Cir. 1981) (holding that the act of state doctrine did not apply because Chase closed its Saigon branch prior to the expropriation decrees and, therefore, had no presence in Vietnam at the time of the decree), *cert. denied*, 459 U.S. 976 (1982); Perez v. Chase Manhattan Bank, N.A., 61 N.Y.2d 460, 474, 463 N.E.2d 5, 11, 474 N.Y.S.2d 689, 695 (holding that because Cuban branches of Chase were open at the time of the confiscation decree, Chase was subject to the jurisdiction of Cuba, and the act of state doctrine relieved Chase of its obligation to comply with demands for repayment), *cert. denied*, 469 U.S. 966 (1984). Under the domicile test, litigants can reasonably predict the success of the act of state defense by ascertaining whether the foreign branch was open at the time of the expropriation decree.

120. *See* Brief for Appellee at 7, Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854 (2d Cir. 1981) (No. 81-7052) (stating that as the collapse of Saigon appeared imminent, officials of Chase Manhattan anticipated massive Vietcong retaliation against United States citizens and those associated with American interests), *cert. denied*, 459 U.S. 976 (1982). The Vietcong, who had fought the United States for more than a twelve years, placed a bounty on the head of the manager of the Saigon branch of Chase Manhattan Bank. *Id.*

121. Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854, 863 (2d Cir.

test forces United States banks to choose between two unattractive alternatives.

Additionally, the domicile test is not an accurate reflection of the principles underlying the territorial limitations of the act of state doctrine.[123] The act of state doctrine bars judicial consideration of a foreign expropriation carried out exclusively within the territory of the expropriating nation[124] because judicial consideration of such acts would interfere with the ability of the President to conduct foreign relations.[125] Judicial consideration of foreign decrees or actions, however, will only inhibit the ability of the President to conduct foreign relations when such consideration frustrates the foreign state's expectation of dominion over the subject matter of the litigation.[126]

The domicile test does not adequately measure a foreign state's expectations of dominion over the subject matter of litigation.[127] The domicile test of situs determination requires a court to determine the applicability of the act of state doctrine solely on the basis of a single fact: whether the branch was open at the time of the expropriation decree.[128] The test does not consider facts surrounding the creation of the debtor-creditor relationship.[129] Consideration of such factors would allow a United States court to assess the expectations of the foreign sov-

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1981), *cert. denied*, 459 U.S. 976 (1982); Trinh v. Citibank, N.A., 623 F. Supp. 1526, 1536 (E.D. Mich. 1985).

122. Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854, 865 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982); Trinh v. Citibank, N.A., 623 F. Supp. 1526, 1536 (E.D. Mich. 1985); *see infra* note 220 (defining the concept of double liability); *see also* notes 168-72 (explaining how the failure of a United States court to apply the act of state doctrine requires a United States bank to satisfy the same obligation twice).

123. Libra Bank Ltd. v. Banco Nacional de Costa Rica, S.A., 570 F. Supp. 870, 884 (S.D.N.Y. 1983).

124. *See supra* notes 68-72 and accompanying text (discussing the territorial limitation of the act of state doctrine).

125. *See supra* notes 78-79 (discussing the separation of powers principles on which the act of state doctrine is based).

126. *See supra* note 80 (discussing when judicial consideration of the actions of a foreign government will interfere with the ability of the President to conduct foreign relations).

127. Libra Bank Ltd. v. Banco Nacional de Costa Rica, S.A., 570 F. Supp. 870, 883-84 (S.D.N.Y. 1983).

128. *See* Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854, 863-64 (2d Cir. 1981) (failing to apply the act of state doctrine solely because Chase had closed the Saigon branch prior to the expropriation decrees), *cert. denied*, 459 U.S. 976 (1982). Because its Saigon branch was closed, Chase did not have a presence within the territory of Vietnam at the time of the decrees. *Id.* at 863.

129. *Cf.* Libra Bank Ltd. v. Banco Nacional de Costa Rica, S.A., 570 F. Supp. 870, 884 (S.D.N.Y. 1983) (holding that the judiciary can obtain a more reasonable measurement of the expectations of the foreign state by considering the facts surrounding the debt in question).

ereign concerning dominion over the deposit relationship and examine the proprietary interests arising from that relationship. Because the domicile test fails to assess adequately the expectations of the foreign sovereign, courts using the test risk frustrating the expectations of the foreign sovereign and thereby hinder the ability of the President to conduct foreign relations.

2. Complete Fruition Test

United States courts increasingly employ the complete fruition situs test rather than the inflexible, domicile test.[130] The complete fruition test is a common-sense test[131] that more accurately reflects the expectations of the foreign government.[132] Under this test, determining the situs of the expropriated property and, thus, the applicability of the act of state doctrine[133] requires a United States court to determine whether the purported taking came "to complete fruition within the dominion of the [foreign] government."[134] Confiscation of private property comes to complete fruition when the confiscating government has the parties and the property before it, and subsequently acts to change the relationship between the parties regarding the property.[135] When a confiscation comes to complete fruition within the dominion of the expropriating state, that state has jurisdiction over the debtor, and the situs of the

130. *E.g.*, Braka v. Bancomer, S.N.C., 762 F.2d 222, 224 (2d Cir. 1985) (applying the complete fruition test); Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516, 521 (2d Cir.) (same), *cert. denied*, 473 U.S. 934 (1985); United Bank Ltd. v. Cosmic Int'l, Inc., 542 F.2d 868, 875 (2d Cir. 1976) (same); Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706, 714-15 (5th Cir.) (same), *cert. denied*, 393 U.S. 924 (1968).

131. *Cf.* Comment, *The Act of State Doctrine*, 10 BROOKLYN J. INT'L L. 243, 250-51 (1984) (stating that as a matter of common sense, a United States court should not consider a foreign state's actions that come to complete fruition within that state because at that point, the court's opinion is irrelevant). When an expropriation comes to complete fruition within the territory of the expropriating state, it is futile for a United States court to nullify or ignore the completed act. Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516, 521 (2d Cir.), *cert. denied*, 473 U.S. 934 (1985). The expropriating state is unlikely to give effect to a United States court opinion that is inconsistent with its own actions. *Id.*

132. *See infra* notes 140-48 and accompanying text (discussing the complete fruition situs determination test).

133. *See supra* notes 17-21 and accompanying text (stating that the applicability of the act of state doctrine depends on the situs of the property being the confiscating state).

134. Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516, 521 (2d Cir.), *cert. denied*, 473 U.S. 934 (1985).

135. Callejo v. Bancomer, S.A., 764 F.2d 1101, 1122-23 (5th Cir. 1985); Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706, 715 (5th Cir.), *cert. denied*, 393 U.S. 924 (1968).

expropriated property is the foreign state.[136] In such situations the act of state doctrine will bar judicial consideration of claims questioning the validity of the completed expropriation.[137]

The complete fruition test is a two-prong test. First, in foreign branch expropriation cases both the creditor (depositor) and the debtor (bank) must be present within the territory of the confiscating state.[138] Second, in all cases, the subject matter of the litigation must have its situs within the territory of the acting state.[139] In foreign branch expropriation cases, courts tend to rely heavily on the provisions of the deposit contract for determining the situs of the deposit[140] and, therefore, the applicability of the act of state doctrine. When the deposit contract provides for repayment of the deposit in United States dollars, in the United States, subject to the laws of the United States, the situs of the deposit is the United States.[141] These contractual provisions give the United States a significant interest in the debtor-creditor relationship and, therefore, lessen the expectations of dominion of the foreign state over the banking relationship and the proprietary interests resulting from that relationship.[142] Where the expropriating state has a reduced expectation of dominion of the expropriated property, judicial consideration of its actions is less likely to interfere with the President in the

136. Braka v. Bancomer, S.N.C., 762 F.2d 222, 225 (2d Cir. 1985).

137. *Id.*

138. *See* Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706, 713-16 (5th Cir.) (holding, in part, that because the defendant was a Florida corporation with no presence in Cuba at the time of the expropriation decree, Cuba was not able to perform a fait accompli, and the act of state doctrine did not apply), *cert. denied*, 393 U.S. 924 (1968).

139. *See* Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516, 521-22 (2d Cir.) (explaining that because the situs of the debt at the time of the exchange control regulations was New York, the government was not in a position to perform a fait accompli and the act of state doctrine did not apply), *cert. denied*, 473 U.S. 934 (1985).

140. *See* Braka v. Bancomer, S.N.C., 762 F.2d 222, 224-25 (2d Cir. 1985) (basing a situs determination solely on the provisions of the certificates of deposits the bank issued to its depositors).

141. *See* Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516, 522-23 (2d Cir.) (holding that where the contract provides for repayment in New York, New York is the situs of the debt), *cert. denied*, 473 U.S. 934 (1985); *see also* Libra Bank Ltd. v. Banco Nacional de Costa Rica, S.A., 570 F. Supp. 870, 886 (S.D.N.Y. 1983) (holding that where the bank incurred the debt in New York, and made partial repayment in New York, New York was the situs of the debt).

142. United Bank Ltd. v. Cosmic Int'l, Inc., 542 F.2d 868, 875 (2d Cir. 1976) (holding that the inability of a foreign state to bring an expropriation to complete fruition within its territory reduces the foreign state's expectations of dominion over the property). Contractual provisions establishing the proprietary interest outside the territory of the state reduces the state's expectations of dominion. Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516, 521-22 (2d Cir.), *cert. denied*, 473 U.S. 934 (1985).

conduct of foreign relations.[143]

Courts using the complete fruition test recognize that when a foreign government is in a position to perform a fait accompli,[144] it is an affront to the confiscating state's expectations of dominion over the banking relationship for courts to ignore or nullify actions based on those expectations.[145] In the context of analyzing a deposit contract, the complete fruition test more accurately reflects the principles underlying the act of state doctrine than does the domicile test. The complete fruition test allows a United States court to consider a number of factors in balancing the interests of the United States against those of the confiscating nation, rather than look solely at whether the foreign branch was open at the time of expropriation.[146] Consideration of these additional factors provides the court with a better understanding of the expectations of dominion over the debtor-creditor relationship.[147] A better understanding of the expectations of the foreign government lessens the likelihood that a United States court will frustrate those expectations and thereby inhibit the ability of the President to conduct foreign relations.[148] The complete fruition test, therefore, is more consistent with constitutional underpinnings of the act of state doctrine than the domicile test.

In addition to providing a more accurate measurement of the expectations of the foreign government, the complete fruition test allows the parties to decide who shall bear the risk of loss resulting from expropri-

143. Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516, 521-22 (2d Cir.), *cert. denied*, 473 U.S. 934 (1985).

144. *See* BLACK'S LAW DICTIONARY, *supra* note 1, at 538 (defining a fait accompli as an accomplished, usually irreversible deed).

145. Callejo v. Bancomer, S.A., 764 F.2d 1101, 1121-23 (5th Cir. 1985); Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516, 521 (2d Cir.), *cert. denied*, 473 U.S. 934 (1985); Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706, 715 (5th Cir.), *cert. denied*, 393 U.S. 924 (1968).

146. *See supra* note 113 and accompanying text (stating that the domicile test considers only one factor: whether the foreign branch was open at the time of the expropriation).

147. *See* Libra Bank Ltd. v. Banco Nacional de Costa Rica, S.A., 570 F. Supp. 870, 884 (S.D.N.Y. 1983) (stating that consideration of factors surrounding the debt enables a United States court to appreciate fully the expectations of the foreign state); *cf. infra* note 152 and accompanying text (explaining that while the complete fruition test provides a more accurate picture of the expectations of a foreign state than the domicile test, it does not go far enough); *id.* (stating that the complete fruition test erroneously focuses almost exclusively on the provisions of the deposit contract).

148. *See* Libra Bank Ltd. v. Banco Nacional de Costa Rica, S.A., 570 F. Supp. 870, 881-84 (S.D.N.Y. 1983) (holding that the consideration of objective factors, such as the place of contracting, the place of repayment, and the currency of account make it unlikely that a court will frustrate the expectations of a foreign sovereign).

ation.[149] If the parties to the deposit contract agree that repayment will be in United States dollars, in the United States, then the situs of the deposit will be the United States, and the act of state doctrine will not relieve the United States bank of its obligation to its depositor, regardless of foreign government intervention.[150] The risk of loss from governmental interference will remain with the debtor bank. The parties, however, can shift the risk of loss that governmental interference causes to the depositors by providing for repayment solely within the territory of the confiscating state in local currency. The situs of the deposit, therefore, will be the confiscating state, and the act of state doctrine will relieve the United States bank of its obligation to repay the depositors of the branch in the event of an expropriation.[151]

Although the complete fruition test provides a more accurate measurement of the expectations and interests of the confiscating state than does the domicile test, it is not flawless. The test focuses exclusively on the provisions of the deposit contract ignoring other factors that may provide a true, precise measurement of the expectations of the foreign government.[152] Without consideration of the events that preceded or followed the creation of the deposit contract, a United States court cannot fully understand the expectations and interests of the foreign government. This lack of understanding increases the likelihood that the court will act in contravention of those expectations, and interfere with the ability of the President to conduct foreign relations.

3. *Incidents of the Debt Test*

The Court of Appeals for the Fifth Circuit recognized the necessity of expanding the scope of its situs analysis beyond the four corners of

149. *See* Garcia v. Chase Manhattan Bank, N.A., 735 F.2d 645, 651-52 (2d Cir. 1984) (Kearse, J., dissenting) (stating that the parties were free to contract for collection any place in the world). Had the parties agreed that collection could not take place in Cuba, the situs of the debt would not be Cuba, and the act of state doctrine would not relieve Chase of its liability to the depositors. *Id.* at 652 (Kearse, J., dissenting).

150. *See* Libra Bank Ltd. v. Banco Nacional de Costa Rica, S.A., 570 F. Supp. 870, 881-82 (S.D.N.Y. 1983) (holding that where the parties provide for repayment in New York, the situs of the debt is New York, and the Bank of Costa Rica must bear any risks associated with the decrees of its government).

151. *See* Perez v. Chase Manhattan Bank, N.A., 61 N.Y.2d 460, 469-70, 463 N.E.2d 5, 9, 474 N.Y.S.2d 689, 693 (stating that because the contract provided for the possibility of repayment in Cuba, Cuba was the situs of the debt), *cert. denied*, 469 U.S. 966 (1984). Therefore, the act of state doctrine barred judicial consideration of claims challenging the Cuban expropriation. *Id.*

152. Libra Bank Ltd. v. Banco Nacional de Costa Rica, S.A., 570 F. Supp. 870, 884 (S.D.N.Y. 1983) (stating that consideration of the facts surrounding the creation of the debt provides a more accurate measurement of the expectations of the foreign state than does consideration of the debtor's domicile alone).

the deposit contract.[153] In *Callejo v. Bancomer, S.A.*,[154] the fifth circuit created the incidents of the debt test.[155] The test focuses on "where the incidents of the debt, as a whole, place it."[156] Determination of where the incidents of the debt took place requires the court to consider a number of factors: the place where the deposit is carried,[157] the place of repayment,[158] the intentions of the parties,[159] and the involvement of the United States regulatory agencies.[160]

Consideration of these factors allows a United States court to determine if the interests of the confiscating state in regulating the deposit relationship outweigh the interests of the United States in supervising the relationship.[161] If the interests of the confiscating state outweigh those of the United States, judicial consideration of the propriety of its actions regarding the deposit relationship will antagonize the foreign state and interfere with the ability of the President to conduct foreign relations.[162] By enabling United States courts to consider these addi-

153. Callejo v. Bancomer, S.A., 764 F.2d 1101, 1123-24 (5th Cir. 1985).

154. *Id.*

155. *Id.* at 1123.

156. *Id.*

157. *Id.*; *see also* Dunn v. Bank of Nova Scotia, 374 F.2d 876, 877-78 (5th Cir. 1967) (holding that the place where the deposit is held, absent contrary contractual provisions, is the situs of the deposit).

158. Callejo v. Bancomer, S.A., 764 F.2d 1101, 1123 (5th Cir. 1985); *see* Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516, 521-22 (2d Cir.) (stating that where the defendant bank issues promissory notes providing for repayment in New York, New York is the situs of the obligation), *cert. denied*, 473 U.S. 934 (1985).

159. Callejo v. Bancomer, S.A., 764 F.2d 1101, 1123 (5th Cir. 1985); *see* Weston Banking Corp. v. Turkiye Garanti Bankasi, A.S., 57 N.Y.2d 315, 324-25, 442 N.E.2d 1195, 1199, 456 N.Y.S.2d 684, 688 (1982) (stating that where the parties intend New York to be the jurisdiction for resolution of disputes, the situs of the debt is New York).

160. Callejo v. Bancomer, S.A., 764 F.2d 1101, 1123 (5th Cir. 1985). In the case of foreign branches, the involvement of the United States regulatory authorities is actually very minimal. The Board of Governors of the Federal Reserve System has primary regulatory authority over the international operations of United States banks. Frankel, *International Banking — Structural Aspects of Regulation*, in BUSINESS CONDITIONS 3-4 (Oct. 1974). Although the Federal Reserve administers applications to establish foreign branches, the Federal Reserve leaves the examination of branch operations to the Office of the Comptroller of the Currency (OCC). J. BAKER, *supra* note 37, at 27. The OCC usually confines its examination to duplicate records that the branch files with its parent. E. SYMMONS & J. WHITE, *supra* note 8, at 753. The foreign branches of United States banks are generally not subject to the regulations imposed on their domestic counterparts, including interest rate limitation, reserve requirements, and deposit insurance. *Id.* at 749-52.

161. Callejo v. Bancomer, S.A., 764 F.2d 1101, 1124 (5th Cir. 1985); Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516, 521-22 (2d Cir.) (balancing the interests of the United States against those of Costa Rica), *cert. denied*, 473 U.S. 934 (1985).

162. *See* Callejo v. Bancomer, S.A., 764 F.2d 1101, 1124-26 (5th Cir. 1985) (holding that the incidents of the debt indicated that the interests of Mexico in the debtor-

tional factors concerning the debtor—creditor relationship, the incidents of the debt test is the situs determination test most consistent with the separation of powers principle underlying the act of state doctrine.[163]

B. Lack of Consensus on Appropriate Situs Determination Test

The history of the act of state doctrine in expropriation of intangible property cases shows that the applicability of the doctrine is a function of the particular situs determination test employed.[164] Despite the importance of situs determination, however, there is no consensus among United States courts on which situs determination test is the appropriate test.[165] A 1985 district court case in Michigan, *Trinh v. Citibank, N.A.*[166] shows how the application of different situs determination tests

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creditor relationship outweighed those of the United States and that it would offend the Mexican government for a United States court to consider the merits of its exchange control regulations).

163. *Id.* at 1123. Less than one year after the decision in *Callejo*, the fifth circuit abruptly abandoned the incidents of the debt test of situs determination. Grass v. Credito Mexicano, S.A., 797 F.2d 220 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1575 (1987). In *Grass*, the fifth circuit did not undertake situs determination. *Id.* at 221. The petition for *certiorari* presented the question whether courts should abandon situs determination in act of state cases. *Id.* Given the lack of consensus on the appropriate test, abandoning situs determination in act of state cases may be advisable. *See infra* note 165 and accompanying text (discussing the split among the circuits concerning the appropriate situs determination test).

164. *See* Note, *Fundamental Inquiry*, *supra* note 20, at 124 (explaining that situs determination is of critical importance in determining the applicability of the act of state doctrine); *see also supra* notes 108-63 and accompanying text (analyzing the three situs determination tests).

165. *Compare* Callejo v. Bancomer, S.A., 764 F.2d 1101 (5th Cir. 1985) (applying the incidents of the debt test in litigation arising from Mexican exchange control restrictions) *with* Braka v. Bancomer, S.N.C., 762 F.2d 222 (2d Cir. 1985) (applying the complete fruition test in a factual situation virtually identical to *Callejo*). Additionally, there is a lack of consensus within each circuit. *Compare* Grass v. Credito Mexicano, S.A. 797 F.2d 220 (5th Cir. 1986) (abandoning situs analysis entirely), *cert. denied*, 107 S. Ct. 1575 (1987) *with* Callejo v. Bancomer, S.A., 764 F.2d 1101 (5th Cir. 1985) (employing the incident of the debt test of situs determination); *compare* Braka v. Bancomer, S.N.C., 762 F.2d 222 (2d Cir. 1985) (using the complete fruition test) *with* Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854 (2d Cir. 1981) (employing the domicile test), *cert. denied*, 459 U.S. 976 (1982).

166. Trinh v. Citibank, N.A., 623 F. Supp. 1526 (E.D. Mich. 1985). The plaintiff's father deposited two million Vietnamese piasters in the Saigon branch of Citibank on July 25, 1974. *Id.* at 1528. He made another deposit of one million piasters on October 25, 1974. *Id.* The plaintiff, a student in Michigan during the final years of the war, learned about the bank account in 1979, when the Vietnamese government released his father from a Vietnamese reeducation camp. *Id.* In May 1980, the plaintiff contacted the international division of Citibank in New York to inquire about the account. *Id.* The defendant stated that the National Bank of Vietnam was responsible for the three million piaster deposit. *Id.* After the defendant repeated its position on November 17,

in a single scenario can lead to different conclusions on the applicability of the act of state doctrine. The following section discusses both the actual use of the domicile test in *Trinh* and the potential ramifications of the hypothetical use of the incidents of the debt test in the same scenario.

In *Trinh v. Citibank, N.A.*,[167] the district court, applying the domicile test of situs determination, held that the closing of Citibank's Saigon branch ended its presence in Vietnam.[168] Because Citibank was not present within the territory of Vietnam at the time of the expropriation decrees, Vietnam did not have jurisdiction over Citibank and could not enforce or collect the debt the branch owed its depositors.[169] Therefore, the United States — not Vietnam — was the situs of the deposits at the time of the expropriation.[170] Because the expropriation decree sought to expropriate property outside Vietnamese territory, the act of state doctrine did not bar judicial consideration of the claim questioning the validity of the Vietnamese decrees.[171] The act of state doctrine, therefore, did not relieve Citibank of its obligation to honor the repayment demands of its Saigon depositors.[172]

In comparison, if the district court had employed the incidents of the debt test, a different outcome would have resulted. The deposit contract between the Saigon branch and a Vietnamese citizen indicates that the branch carried the deposit.[173] The deposit contract called for repayment in Saigon,[174] and the parties to the contract intended the laws of Vietnam to govern the deposit relationship.[175] Finally, the Saigon branch was subject to only rudimentary supervision by the United States regulatory agencies.[176] Consequently, the incidents of the debt as

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1980, the plaintiff initiated the suit. *Id.*

167. *Id.*

168. *Id.* at 1536.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *See* Heininger, *supra* note 49, at 975 (stating that a deposit is considered held at the branch that is a party to the deposit contract).

174. *See supra* note 52 and accompanying text (showing that ordinarily, a deposit contract is repayable only at the branch where the contract was made).

175. *See* E. ROUSSAKIS, *supra* note 24, at 17 (stating that a United States bank operating an overseas branch expects to be subject to the laws of the host country). A United States bank operating an overseas branch does not intend to offer its overseas customers any greater protections than those afforded to locally incorporated banks. Logan & Kantor, *supra* note 49, at 334-35.

176. *See supra* notes 49, 160 (discussing the role of United States banking authorities in the supervision of foreign branches of United States banks).

a whole would have placed the debt in Vietnam.[177] Under this test, the situs of the debt was Vietnam; Vietnam, therefore, had jurisdiction over Citibank at the time of the expropriation decrees.[178] The act of state doctrine, therefore, would preclude the district court from questioning or challenging the actions of the provisional revolutionary government taken within its territory.[179] The district court would have to accept the Vietnamese action as a collection of the debt owed the Saigon depositors.[180] Therefore, the expropriation would have extinguished the debt and relieved Citibank of its obligation to the depositors of the Saigon branch.[181]

This hypothetical discussion clearly illustrates the effects of the lack of judicial agreement on the appropriate situs determination test. The liability of the United States bank depends on the jurisdiction in which the depositor brings suit. If the *Trinh* suit had been brought in a jurisdiction that follows the incidents of the debt test developed in the fifth circuit, the act of state doctrine would have shielded Citibank from liability. Such a situation promotes forum shopping rather than fair adjudication of foreign branch expropriation cases.

C. Possible Inequities Resulting from the Use or Nonuse of the Act of State Doctrine

The act of state doctrine, when applied in foreign branch expropriation cases, relieves a United States bank of its obligation to repay the depositors of its expropriated branch.[182] The rule, however, does not make allowances for the possibility that the expropriating nation will confiscate only a limited percentage of the assets and liabilities of the branch.[183] Consequently, when a foreign state expropriates less than

177. *See* Callejo v. Bancomer, S.A., 764 F.2d 1101, 1123-25 (5th Cir. 1985) (holding that consideration of these factors placed the debt in Mexico).

178. *Cf. id.* (holding that where the incidents of the debt places it within Mexico, the act of state doctrine is applicable).

179. *See id.* (holding that consideration of the Mexican exchange control restrictions would be a serious affront to Mexico).

180. *See* Perez v. Chase Manhattan Bank, N.A., 61 N.Y.2d 460, 473, 463 N.E.2d 5, 11, 474 N.Y.S.2d 689, 695 (stating that application of the act of state doctrine requires a court to accept the expropriation as a collection of the debt), *cert. denied*, 469 U.S. 966 (1984).

181. *See id.* (holding that where courts apply the act of state doctrine because the Cuban confiscation amounted to collection of the debt owed, the doctrine relieves Chase of any obligation to make a second payment on the same debt).

182. *Id.*

183. *See* S. Khoury, *supra* note 44, at 81 (stating that banks derive 23% of the assets of a foreign branch from obligations of other components of the parent's international banking network). It is doubtful that a confiscating state could require surrender of these assets. Heininger, *supra* note 49, at 999-1000.

100% of the branch assets, application of the act of state doctrine allows the United States parent to escape responsibility for 100% of the liabilities of the branch and provides the parent with an unexpected, unearned windfall profit.[184] Courts should not permit United States banks to use the act of state doctrine as a tool to exact unfair profits at the expense of foreign depositors.

When courts do not apply the doctrine, as in *Vishipco Line v. Chase Manhattan Bank, N.A.*[185] and *Trinh v. Citibank, N.A.*,[186] the foreign depositors can recoup their deposits from the parent bank in the United States.[187] Such a rule allows foreign depositors to avail themselves of the stability and protections the United States banking system provides,[188] without having to pay the price United States depositors must pay[189] for that stability and protection.[190] Deriving a benefit without paying the price others must pay for the same benefit, however, is antithetical to the values underlying the United States position on expropriations.[191] Therefore, United States courts should not allow foreign depositors to avail themselves of the protections of the United States banking system unless they pay the price of those protections.[192]

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184. Heininger, *supra* note 49, at 999-1000.

185. Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982).

186. Trinh v. Citibank, N.A., 623 F. Supp. 1526 (E.D. Mich. 1985).

187. Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854, 862 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982); Trinh v. Citibank, N.A., 623 F. Supp. 1526, 1536 (E.D. Mich. 1985).

188. *See, e.g.*, National Banking Act of 1864, ch. 106, § 29, 12 U.S.C. § 84 (1982) (placing limits on the total number of loans and extensions of credit a bank can make to one person at any one time); Federal Reserve Act of 1933, ch. 89, § 8, 12 U.S.C. § 264 (1982) (establishing a permanent deposit insurance fund); Bank Holding Company Act of 1956, Pub. L. No. 84-511, ch. 240, 12 U.S.C. §§ 1841-1850 (1982) (restricting the activities of companies that own or control commercial banks). The goal of federal banking legislation is to ensure the stability and efficiency of the nation's financial institutions. S. REP. NO. 1482, 89th Cong., 2nd Sess. 4-5, *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS 3532, 3535-36.

189. M. WEIDENBAUM, *supra* note 49, at 69. Federal regulation of financial institutions indirectly costs United States citizens over one billion dollars annually. *Id.*

190. *See supra* note 49 (explaining that foreign branches are generally free of the costly restrictions imposed on their domestic counterparts).

191. *Cf.* Note from Secretary of State Cordell Hull to Mexico's Minister of Foreign Affairs, July 1938, *reprinted in* 3 G.H. HACKWORTH, DIGEST OF INTERNATIONAL LAW 655-61 (1942) (stating the United States opposes any government taking private property without paying for it); *see also* D.P. O'CONNELL, *supra* note 71, at 266-67 (explaining the equitable principle of just compensation).

The Board of Governors has unequivocally stated that depositors of foreign branches whose deposits are not subject to the restrictions of Regulations D or Q may not obtain the benefits and privileges of the United States regulatory framework. Logan & Kantor, *supra* note 49, at 336.

192. *But cf.* Vishipco Line v. Chase Manhattan Bank, N.A. 660 F.2d 854, 856 (2d Cir. 1981) (allowing a Vietnamese depositor of the defendant Saigon branch to recover

IV. LEGISLATIVE HOSTILITY TOWARD THE ACT OF STATE DOCTRINE

United States courts have shown a tendency to curtail the scope of the act of state doctrine through the creation of broad exceptions to the doctrine.[193] At times, however, the judiciary, refusing to yield to outside political considerations, has applied the traditional act of state doctrine and rendered decisions unpalatable to the legislative branch.[194] Such decisions routinely elicit legislative responses to the inequities that legislators believe are inherent in the act of state doctrine.[195] Two manifestations of this legislative opposition to the act of state doctrine are the International Rule of Law Act of 1981,[196] and the proposed

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its deposits in the United States), *cert. denied*, 459 U.S. 976 (1982); Trinh v. Citibank, N.A., 623 F. Supp. 1526, 1536 (E.D. Mich. 1985) (same). The *Vishipco* and *Trinh* decisions allowing depositors of foreign branches to recover their deposits in the United States is contrary to the position of the Board of Governors of the Federal Reserve System. *See* Logan & Kantor, *supra* note 49, at 336 (stating that depositors of a foreign branch should not be able to recover their deposits from the parent bank in the United States). United States courts, however, ordinarily accord great deference to the decisions and opinions of administrative or regulatory agencies. Therefore, the decisions in *Vishipco* and *Trinh* are also contrary to the long-standing judicial practice of deferring to regulatory agencies in cases concerning their area of expertise.

193. *See supra* notes 82-86 and accompanying text (discussing the Bernstein exception to the act of state doctrine); *supra* notes 87-91 and accompanying text (introducing the commercial activity exception to the act of state doctrine); *supra* notes 92-94 and accompanying text (examining the treaty exception to the act of state doctrine).

194. *See* Comment, *Limiting the Act of State Doctrine: A Legislative Initiative*, 23 VA. J. INT'L L. 103, 113 (1982) [hereinafter Comment, *Limiting the Act of State Doctrine*] (describing the intense lobbying effort surrounding the decision in *Sabbatino*).

195. *See* Foreign Assistance Act of 1964, Pub. L. No. 88-633, § 301(d)(4), 78 Stat. 1009, 1013 (codified at 22 U.S.C. § 2370(e)(2) (1982)) [hereinafter Hickenlooper Amendment] (containing the first congressional attempt to limit the application of the act of state doctrine). The Hickenlooper Amendment was a direct response to the Supreme Court decision in *Banco Nacional de Cuba v. Sabbatino*. Comment, *Limiting the Act of State Doctrine*, *supra* note 194, at 113. The Hickenlooper Amendment precludes United States courts from invoking the act of state doctrine and refusing to judge the merits of a case involving a claim of title or other rights to property taken in violation of international law. Hickenlooper Amendment, *supra*. The amendment has not received widespread judicial recognition. Bazyler, *supra* note 85, at 393.

The judiciary, in opposition to congressional encroachment on the judicially created act of state doctrine, has so narrowly interpreted the language of the Hickenlooper Amendment as to preclude its application. Comment, *Limiting the Act of State Doctrine*, *supra* note 194, at 114 n.61; Note, *Harvest of* Sabbatino, *supra* note 35, at 96-97. In fact, only two courts have successfully invoked the Hickenlooper Amendment: West v. Multibanco Comerex, 807 F.2d 820 (9th Cir.), *cert. denied*, 107 S. Ct. 2483 (1987), and Banco Nacional de Cuba v. Farr, 383 F.2d 166 (2d Cir. 1967). The Hickenlooper Amendment is the subject of countless articles and commentaries. This Comment, however, discusses the Hickenlooper Amendment solely for historical purposes. The primary concern of this Comment is the most recent attempts to alter or abolish the act of state doctrine.

196. S. 1434, 97th Cong., 1st Sess., 127 CONG. REC. 13,960 (1981).

amendments to the Foreign Sovereign Immunities Act of 1976.[197] While each proposal died in Congressional committee, they must not be viewed in isolation. The International Rule of Law Act of 1981 and the proposed amendments to the Foreign Sovereign Immunities Act of 1976, as the only pieces of proposed legislation in the 1980s to attack the scope of the act of state doctrine, are merely the most recent examples of the conflict between the judiciary and Congress over the proper scope of the act of state doctrine.

A. THE INTERNATIONAL RULE OF LAW ACT OF 1981

Senators Mathias and Dominici introduced the International Rule of Law Act (IRLA) in 1981.[198] The IRLA provided that "no court in the United States shall decline on the ground of the Federal Act of State doctrine to make a determination on the merits in any case in which the act of state is contrary to international law."[199] This proposed curtailment of the act of state doctrine contained two fatal flaws. First, there is no universally accepted rule of international law on expropriations.[200] Second, the IRLA would have effectively eliminated a defense for United States banks in foreign branch expropriation cases and thereby subject the banks to the risk of double liability.[201]

1. Lack of Clear Consensus on International Law

Every government possesses the right to expropriate private property

197. H.R. 3137, 99th Cong., 1st Sess. (1985), *reprinted in Proposed Amendments to the Foreign Sovereign Immunities Act of 1976: Hearings on H.R. 3137 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 1 (1986) [hereinafter *FSIA Hearings*].

198. S. 1434, 97th Cong., 1st Sess., 127 CONG. REC. 13,959 (1981). The International Rule of Law Act was a response to growing dissatisfaction with the piecemeal approach of evolving judicial precedent on the act of state doctrine. Lacey, *supra* note 55, at 11. Senators Charles Mathias and Peter Dominici introduced the bill on June 25, 1981, less than two months after the second circuit heard oral arguments in *Vishipco Line v. Chase Manhattan Bank, N.A.* S. 1434, 97th Cong., 1st Sess., 127 CONG. REC. 13,959-60 (1981). Citicorp and Chase Manhattan Bank were two of the three Fortune 500 corporations giving opinions on S. 1434. *IRLA Hearings*, *supra* note 81, at 130-35, 143-46. Given these facts, it is reasonable to conclude that S. 1434 was, in part, a response to the application of the act of state doctrine in foreign branch expropriation cases such as *Vishipco*. It is possible that as cases follow the reasoning of *Vishipco*, efforts to amend or abolish the act of state doctrine will increase.

199. S. 1434, 97th Cong., 1st Sess. § 3 (1981), *reprinted in IRLA Hearings*, *supra* note 81, at 4.

200. *See infra* notes 205-11 and accompanying text (discussing the international law on expropriations).

201. *See infra* notes 218-24 and accompanying text (discussing the consequences of eliminating the act of state doctrine in foreign branch expropriation cases).

within its jurisdiction for public use when the exigencies of public welfare so demand.[202] Industrialized nations, led by the United States, expect governments to take private property on a nondiscriminatory basis[203] and confiscate private property solely to ameliorate the welfare of the population of the confiscating nation.[204]

There is, however, no international consensus on the standard of compensation in expropriation cases.[205] According to the United States, an international minimum standard exists, which requires the expropriating state to provide prompt, adequate, and effective compensation to aliens whose property is confiscated.[206] Newly independent and developing nations, however, do not espouse this principle of compensation.[207] These nations view such an interpretation of state responsibility as a rule of the former imperial powers and claim it is not binding without their consent.[208] The standard that the newly independent and developing nations prefer is a national treatment standard.[209] This rule

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202. 45 AM. JUR. 2D *Int'l Law* § 83 (1969).

203. State Department Press Release No. 630, *supra* note 71.

204. *Id.*

205. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427-31 (1964) (stating that there are few areas in international law on which opinion is so divided as the limitations on the power of a state to expropriate the property of aliens). There is a sharp conflict between the industrialized and developing countries on the duty to compensate property owners for expropriated property. *Id.* at 429-30. The disagreement involves a basic divergence between the national interests of capital importing and capital exporting nations and between the social ideologies of countries that favor state control of the means of production and those that adhere to a free enterprise system. *Id.* at 430.

206. State Department Press Release No. 630, *supra* note 71. A state should provide appropriate compensation to the owner of foreign property. G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31) at 52, U.N. Doc. A/9631 (1974). In the view of the United States, appropriate compensation, in accordance with international law, is prompt, adequate, and effective compensation. Schwebel, *The Story of the U.N.'s Declaration on Permanent Sovereignty over Natural Resources*, 49 A.B.A. J. 463, 465-66 (1963).

207. *See* Vicuña, *The International Regulation of Valuation Standards and Processes: A Reexamination of Third World Perspectives*, in 3 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 134 (R. Lillich ed. 1975) (noting that "it is neither possible nor desirable to try to establish a single standard or principle for the compensation of nationalized foreign property as a universal rule of international law").

208. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 429-30 (1964). The United States and Europe forced most Latin American countries to submit disputes relating to denial of justice and responsibility of states to international arbitration tribunals that applied the law of the great powers. B. WESTON, R. FALK & A. D'AMATO, INTERNATIONAL LAW AND WORLD ORDER 697 (1980). Consequently, there is no denying that "the history of the development of international law on the responsibility of states for injuries to aliens" is related to "imperialism, or dollar diplomacy." *Id.* at 698. The development of these laws were "based almost entirely on the unequal relations between the Great Powers and the small states." *Id.*

209. RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES §

limits the responsibility of the expropriating state to afford alien property owners the same treatment accorded domestic property owners.[210] Under this standard, there is no automatic right to compensation for expropriated property.[211]

The lack of a clear consensus on the international standards governing state responsibility to compensate alien property owners for expropriated property inhibits United States courts from adjudicating cases on the merits.[212] Under the proposal, prior to addressing the merits of a case, a United States court must determine whether the uncompensated expropriation is a violation of international law.[213] This is an extremely difficult task because there is no consensus on what constitutes international law on compensation for expropriations.[214] If a United States court concludes that a foreign nation violated international law, it will antagonize that nation.[215] Such antagonism would hinder the ability of the President to conduct foreign relations.[216] Consequently, rather than risk creating an embarrassing situation for the President, United States courts will likely refrain from classifying the acts of foreign states as violations of international law, and allow application of the act of state doctrine instead.[217]

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165 comment a (1965). Each state is entitled to settle any disputes concerning compensation and mode of payment in accordance with its national legislation. G.A. Res. 3171, 28 U.N. GAOR Supp. (No. 30) at 52, U.N. Doc. A/9030 (1973). Accordingly, the question of compensation is settled under the domestic law of the nationalizing state and through tribunals. G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31) at 52, U.N. Doc. A/9631 (1974).

210. RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 65 comment a (1965).

211. *See* Note from Mexican Minister of Foreign Affairs to Secretary of State Cordell Hull, August 3, 1938, *reprinted in* 3 G.H. HACKWORTH, *supra* note 191, at 655-61 (stating that many countries believe there is no automatic duty to compensate for expropriating private property). Mexico is under an obligation to determine the time and manner of compensation through its own laws. *Id.* at 658.

212. Letter of Patrick J. Mulhern, Senior Vice-President and General Counsel of Citibank, N.A., *reprinted in IRLA Hearings*, *supra* note 81, at 143, 144-45 (1981) [hereinafter Citibank Letter].

213. *See supra* text accompanying note 199 (stating that the International Rule of Law Act would require United States courts to adjudicate the merits of a case when the actions of foreign states violate international law).

214. *See supra* notes 205-11 and accompanying text (discussing the conflicting opinions on the standards of state responsibility in expropriation cases).

215. *IRLA Hearings*, *supra* note 81, at 130, 133 (statement of the Chase Manhattan Bank, N.A.).

216. *Id.*

217. *See supra* note 199 (implying that the act of state doctrine will apply when the actions of the foreign state do not conflict with international law).

2. *Denial of an Affirmative Defense for United States Banks*

The sponsors of the IRLA intended it to facilitate the fair and just resolution of disputes.[218] In foreign branch expropriation cases, however, the bill would have had the opposite effect.[219] Denial of the act of state defense would have greatly increased the risk of double liability for a United States bank operating branches abroad.[220] For example, *Perez v. Chase Manhattan Bank, N.A.* clearly illustrates the potential consequences of eliminating the act of state defense. In *Perez*, the Cuban government confiscated certificates of deposit (CDs) of individuals associated with the Batista regime.[221] When the holders of the CDs sued Chase Manhattan Bank in New York for repayment, the New York Court of Appeals ruled that the act of state doctrine precluded the court from examining the confiscation decrees of the Cuban government.[222] The decision prevented Chase from having to pay twice on the same accounts.[223] In *Perez*, denial of the act of state defense would have forced Chase Manhattan Bank to assume double liability for the deposits of the Cuban branches.[224] Elimination of the act of state defense through the IRLA, by increasing the risks of double liability, would have inhibited United States banks from expanding their international banking networks, thereby jeopardizing their roles as leaders in international banking.

B. 1985 Amendments to the Foreign Sovereign Immunities Act of 1976

A bill, H.R. 3137 was introduced in 1985 in the United States House

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218. *See IRLA Hearings*, *supra* note 81, at 130 (statement of the Chase Manhattan Bank, N.A.) (stating that any attempt to preclude a party from adjudicating the merits of a case is immediately suspect, and the IRLA is a laudable attempt to open courts to full adjudication of the merits of a claim).

219. *See* Citibank Letter, *supra* note 212, at 144-45 (stating that the proposed bill would inhibit courts from determining cases on the merits where the act of state is not a clear violation of international law).

220. *See IRLA Hearings*, *supra* note 81, at 132-33 (statement of the Chase Manhattan Bank, N.A.) (defining the concept of double liability). If a United States court determines that a confiscation violates international law, it imposes liability on the United States bank for deposits that the bank has already paid to the foreign government through the expropriation. *Id.* Double payment is clearly unfair. *Id.*

221. Perez v. Chase Manhattan Bank, N.A., 61 N.Y.2d 460, 467, 463 N.E.2d 5, 6, 474 N.Y.S.2d 689, 691, *cert. denied*, 469 U.S. 966 (1984).

222. *Id.* at 471, 463 N.E.2d at 9, 474 N.Y.S.2d at 693.

223. *Id.* at 474, 463 N.E.2d at 11, 474 N.Y.S.2d at 695.

224. *Contra id.* at 474, 463 N.E.2d at 11, 474 N.Y.S.2d at 695 (holding the act of state doctrine relieved Chase Manhattan Bank of liability for the debt it had already paid).

of Representatives to amend the Foreign Sovereign Immunities Act of 1976 (FSIA).[225] The primary purpose of the bill was to clarify the definition of "commercial activity" contained in the FSIA.[226] Additionally, the bill sought to curtail the application of the act of state doctrine in cases in which a foreign sovereign became a litigant.[227] Section 3 of H.R. 3137 precluded application of the act of state doctrine in expropriation, breach of contract, and arbitration cases brought pursuant to the FSIA.[228] The bill, however, would have had absolutely no effect in foreign branch expropriation cases, even if it had survived hearings before the Administrative Law and Governmental Relations Subcommittee of the House Judiciary Committee. The bill would have been ineffective for two reasons. First, the very language of the act of state provision rendered the provision inapplicable in foreign branch expropriation cases. Second, even if Congress revised the flawed language of the act of state doctrine provision, the jurisdictional requirements of the FSIA would have precluded application of any modified act of state provision.

The limitations on the application of the act of state doctrine contained in H.R. 3137 applied only to actions against a foreign sovereign, its agents, or instrumentalities.[229] Foreign branch expropriation cases, however, ordinarily involve a depositor of the expropriated branch, and the United States parent of the branch.[230] Therefore, because the re-

225. *FSIA Hearings*, *supra* note 197, at 1.

226. *See id.* at 18 (testimony of the Honorable Don Edwards) (stating that the ambiguity concerning the definition of commercial activity shields a sovereign state from the jurisdiction of United States courts). To cure this problem, H.R. 3137 provides that any property of a foreign state that is used or intended for commercial activity in the United States may be reached to satisfy a judgment. *Id.* at 20. Commercial activities include any foreign state's promise to pay, issue debt security, and guarantee another party's payment. H.R. 3137, 99th Cong., 1st Sess. § 1 (1985), *reprinted in FSIA Hearings*, *supra* note 197, at 5. *But see* 28 U.S.C. § 1603(d) (1982) (defining commercial activities and noting the narrow definition of commercial activity for purposes of the FSIA). In determining whether a transaction is a commercial activity, courts must examine the nature rather than the purpose of the transaction. *Id.* Activity in which a private party ordinarily engages is commercial activity under the FSIA, and a foreign state is not entitled to immunity when engaged in this activity. International Ass'n of Machinists & Aerospace Workers v. Organization of Petroleum Exporting Countries (OPEC), 477 F. Supp. 553, 566-67 (C.D. Cal. 1979), *aff'd*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

227. *See* H.R. 3137, 99th Cong., 1st Sess. § 3 (1985), *reprinted in FSIA Hearings*, *supra* note 197, at 6-7 (noting that the reduction of a foreign state's activities granted immunity).

228. *FSIA Hearings*, *supra* note 197 at 33 (statement of Elizabeth G. Verville, Acting Legal Adviser, Department of State).

229. *Id.* at 36.

230. Garcia v. Chase Manhattan Bank, N.A., 735 F.2d 645 (2d Cir. 1984) (involving an expropriated Cuban branch and New York main office of Chase Manhattan

strictions contained in H.R. 3137 applied only in cases involving a foreign sovereign, and foreign branch expropriation cases are not such cases, H.R. 3137 would have been irrelevant in foreign branch expropriation cases.

The State Department, however, raised the possibility of eliminating the restrictive language of the act of state provisions contained in H.R. 3137.[231] Under this approach, the limitations on the act of state doctrine contained in the bill would have applied to cases involving private parties as well as cases involving foreign sovereigns.[232] In foreign branch expropriation cases, however, such an extension would be detrimental to the interests of United States banks with international banking activities.[233] Additionally, such an extension of H.R. 3137 is procedurally impractical.

The restrictions on the act of state provisions of H.R. 3137 would have applied only in expropriation cases brought pursuant to the FSIA.[234] Accordingly, the jurisdiction of a United States court to adjudicate expropriation cases under the FSIA is extremely limited.[235] A United States court can exercise jurisdiction over an expropriation claim only if the claim involves rights in property taken in violation of international law.[236] Additionally, either the property or proceeds of the property must be present in the United States in connection with the commercial activities of the foreign sovereign, or an agency of the foreign state engaged in commercial activities in the United States must own or operate the property.[237] These jurisdictional requirements render impractical any attempt to expand the restrictions of H.R. 3137 to foreign branch expropriation cases between private parties.

Bank); Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854 (2d Cir. 1981) (concerning an expropriated Saigon branch and New York main office of Chase Manhattan Bank), *cert. denied*, 459 U.S. 976 (1982); Trinh v. Citibank, N.A., 623 F. Supp. 1526 (E.D. Mich. 1985) (involving Citibank, N.A. and Citibank Saigon).

231. *FSIA Hearings*, *supra* note 197, at 36 (statement of Elizabeth G. Verville, Acting Legal Adviser, Department of State).

232. *Id.*

233. *See supra* notes 218-24 and accompanying text (discussing how the elimination of the act of state doctrine in foreign branch expropriation cases prejudices the interests of United States banks).

234. H.R. 3137, 99th Cong., 1st Sess. § 3 (1985), *reprinted in FSIA Hearings*, *supra* note 197, at 3; *id.* at 33 (statement of Elizabeth G. Verville, Acting Legal Adviser, Department of State).

235. *FSIA Hearings*, *supra* note 197, at 103 (statement of Mark B. Feldman, Chairman of the Ad Hoc Committee on the Revision of the Foreign Sovereign Immunities Act, Section of International Law and Practice, American Bar Association).

236. 28 U.S.C. § 1605(a)(3) (1982).

237. *Id.* Additionally, a United States court can exercise jurisdiction over an expropriation claim brought as a counterclaim in an action involving a foreign state. *Id.* § 1607.

The confiscation of property in violation of international law is a threshold requirement regarding the exercise of jurisdiction pursuant to the FSIA.[238] The precise nature of international law on expropriations is unsettled.[239] United States courts, recognizing this uncertainty, are reluctant to conclude that expropriation decrees of a foreign government violate principles of international law.[240] This judicial reluctance effectively precludes a plaintiff from satisfying the threshold jurisdictional requirement for the exercise of jurisdiction in expropriation cases. Therefore, the jurisdictional requirements that the FSIA imposes on all expropriation cases effectively nullifies any expansion of the act of state restrictions contained in H.R. 3137.

V. PROPOSALS

Congress, perceiving inequities in many expropriation cases, has designed legislation to prevent these inequitable results.[241] Such legislation, however, has not achieved the ends Congress sought.[242] This section discusses two possible solutions to the problem of applying the act of state doctrine in foreign branch expropriation cases. The first, a very broad solution, suggests judicial acceptance of a situs determination test based entirely on conflict of laws principles.[243] The second recommends that Congress enact a statute applicable exclusively in foreign branch appropriation cases to accompany legislative attempts to restrict application of the act of state doctrine.[244]

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238. *Id.* § 1605(a)(3). After demonstrating a confiscation of property in violation of international law, the party challenging the propriety or validity of the taking must show contacts between the expropriated property and the United States. *Id.* Money is an extremely fungible good, and when money is deposited in a bank it loses its independent identity. 5A MICHIE ON BANKS AND BANKING § 114 (1983). Arguably, when the deposits of an expropriated branch are commingled with the funds of the central bank of the expropriating state, they too lose their independent identity. Consideration of whether this fact precludes establishing this additional jurisdictional requirement is beyond the scope of this Comment.

239. *See supra* notes 205-11 and accompanying text (discussing international disagreement concerning the obligations of an expropriating state).

240. *See supra* notes 215-17 and accompanying text (discussing judicial reluctance to label a nation a violator of international law).

241. *See supra* notes 196-97 and accompanying text (discussing legislative attempts to restrict or eliminate the act of state doctrine).

242. *See supra* note 195 (explaining judicial hostility to the Hickenlooper Amendment); *see also supra* notes 200-24 and accompanying text (explaining the shortcomings of the International Rule of Law Act of 1981); *supra* notes 228-40 and accompanying text (showing the flaws in the proposed amendments to the Foreign Sovereign Immunities Act of 1976).

243. *See infra* notes 245-65 and accompanying text (discussing the conflict of laws approach to situs determination).

244. *See infra* notes 268-84 and accompanying text (discussing a statutory ap-

A. Conflict of Laws Approach to Situs Determination

The act of state doctrine is a conflict of laws principle.[245] Because situs determination tests are of paramount importance in determining the applicability of the act of state doctrine in foreign branch expropriation cases,[246] the situs determination test employed should reflect conflict of laws principles. This section outlines the strengths and weaknesses of a conflict of laws approach to situs determination.

The prevailing conflict of laws principle in contract cases[247] is the center of gravity doctrine.[248] In cases involving the interests of two or more states, the doctrine requires the forum court to determine which state has the most significant relationship to the subject matter of the dispute.[249] A court must consider the contacts between the subject matter of the dispute and the interested states to determine which state has the most significant relationship with the dispute.[250] Among the con-

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proach to foreign branch expropriation cases).

245. Jimenez v. Aristequieta, 311 F.2d 547, 557 n.6 (5th Cir.), *cert. denied*, 373 U.S. 914 (1962); Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845, 855 (2d Cir. 1962), *rev'd on other grounds*, 376 U.S. 398 (1964); Restatement (Second) Foreign Relations Laws of the United States § 41 comment c (Tent. Draft No. 7 (1986)).

246. Note, *Fundamental Inquiry*, *supra* note 20, at 124.

247. *See* Bank of Marin v. England, 385 U.S. 99, 101 (1966) (holding that the debtor-creditor relationship between a bank and its depositors is a contractual relationship). The debtor-creditor relationship can be created through either an express or implied contract. 9 C.J.S. *Banks and Banking* § 267(b) (1938).

248. *See* Fricke v. Isbrandtsen Co., 151 F. Supp. 465, 467 (S.D.N.Y. 1957) (stating that federal courts determine the center of gravity of a contract to determine the governing substantive law of the contracts). Courts use the doctrine exclusively in controversies concerning which state laws govern the contractual relationship at issue. *See, e.g.*, Fleet Messenger Serv., Inc., v. Life Ins. Co. of N. Am., 315 F.2d 593, 596 (2d Cir. 1963) (applying the center of gravity test, the court held that New York law, not Pennsylvania law, governed an insurance contract); Strubbe v. Sonnenschein, 299 F.2d 185, 189 (2d Cir. 1962) (holding New Jersey law rather than New York law governed the insurance contract); Richland Dev. Co. v. Staples, 295 F.2d 122, 127 (5th Cir. 1961) (applying Alabama law over Missouri law). The rationale for applying the test in choice of law situations, however, supports use of the doctrine as a situs determination test for act of state purposes. *See infra* notes 258-64 and accompanying text (discussing the applicability of the "center of gravity" test in act of state cases).

249. *See supra* note 248 (providing cases that used the center of gravity doctrine).

250. R. Leflar, American Conflicts Law 307 (3d ed. 1977); Restatement (Second) Conflict of Law § 188(2) (1969). The fifth circuit has gradually moved toward the center of gravity concept in determining the situs of intangible property. *See* Callejo v. Bancomer, S.A., 764 F.2d 1101, 1123 (5th Cir. 1985) (considering several contacts that the center of gravity doctrine considers significant). The situs determination test that the court in *Callejo* employed differs from the center of gravity test because it does not require qualitative evaluation of the factors considered. *See infra* notes 251-57 and accompanying text (explaining the qualitative evaluation of the factors examined under the center of gravity test).

tacts courts consider are the place of contracting,[251] the place of negotiation of the contract,[252] the place of performance,[253] and the domicile, residence, nationality, place of incorporation, and place of business of the parties.[254]

The center of gravity test found in the *Restatement (Second) Conflict of Laws* is not a rigid, mechanical test that requires judges to add up the contacts between the transaction and each interested state and then rule that the state with the most contacts to the transaction has the most significant relationship to the subject matter of the dispute.[255] Rather, the test grants judges discretion to evaluate the relative importance of the contacts between the transaction in question and the interested states.[256] The strength of this qualitative evaluation of the con-

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251. RESTATEMENT (SECOND) CONFLICT OF LAWS § 188 (2)(a) (1969). The place where the last act necessary to create a legal obligation occurs is the place where a contract is made. 1 S. WILLISTON, CONTRACTS § 97 (3d ed. 1957). Although the place of contracting is a significant factor in determining which state has the most significant relationship to the subject of the litigation, it is not an all-important factor. R. LEFLAR, *supra* note 250, at 297. In fact, in certain situations, the actual completion of the contract will be a fortuitous and relatively insignificant event in the total contractual relationship between the parties. Cochran v. Ellsworth, 126 Cal. App. 2d 429, 437-38, 272 P.2d 904, 909 (1954). Because a bank assumes a legal obligation when it accepts a deposit, the office at which the deposit is taken is the place of contracting. 1 W. SCHLICHTING, *supra* note 8, § 9.02(1).

252. RESTATEMENT (SECOND) CONFLICT OF LAWS § 188(2)(b) (1969). The state in which protracted negotiations take place has an interest in overseeing the conduct of negotiations and the contract resulting from such negotiations. *Id.* § 188 comment e.

253. *Id.* § 188(2)(c). The state in which performance is to occur has an interest in ensuring that performance of contractual obligations does not jeopardize public health or safety. *Id.* § 188 comment e. The place of performance becomes less significant when "(1) at the time of contracting it is either uncertain or unknown, or when (2) performance by a party is divided more or less equally among two or more states with different local rules on the particular issue." *Id.* For conflict of laws purposes, when a contract calls for performance in more than one state, the state in which the nonperforming party realizes the benefits of the contract is the state of performance. Graham v. Wilkins, 145 Conn. 34, 39-40, 138 A.2d 705, 708 (1958).

254. RESTATEMENT (SECOND) CONFLICT OF LAWS § 188(2)(e) (1969). When a party to the contract is a citizen or resident of a state, that state has an interest in protecting the party. *Id.* § 188 comment e.

255. *See id.* § 188 (stating the "contacts are to be evaluated according to their relative importance with respect to the particular issue"). *But see* Weintraub, *Choice of Law in Contract*, 54 IOWA L. REV. 399, 413-14 (1968) (stating that despite the *Restatement* provision concerning qualitative evaluation of the contacts considered, judges resort to a direct counting of the physical contacts between the transaction and each interested state). A court that merely counts the contacts between the subject matter of the litigation and each interested state cannot determine which state has the most significant relationship to the transaction at issue in the litigation. *Id.*

256. RESTATEMENT (SECOND) CONFLICT OF LAWS § 6 (1969). The evaluation of the contacts between the subject matter of the litigation and the interested states requires consideration of the needs of the interstate and international systems, the relevant policies of the forum, the relevant policies of the interested states, the protection of justified expectations, the policies underlying the particular field of law, and the

tacts between the subject matter of the dispute and each interested state is that it allows a court to determine, in a particular factual setting, which state is most intimately concerned with the subject matter of the litigation.[257]

Although courts only employ the center of gravity test in a straight choice of law context,[258] the concepts underlying the test make it ideally suited as a situs determination test in foreign branch expropriation cases. Identifying and qualitatively evaluating the contacts between the deposit contract and the interested foreign state would allow a United States court to appreciate fully the expectations of the foreign state regarding that contract.[259] A United States court that fully understands those expectations of dominion over the disputed property is unlikely to act in contravention of those expectations.[260] Because the center of gravity test avoids frustrating the expectations of dominion of a foreign state over the deposit relationship, courts would be less likely to interfere with the ability of the President to conduct foreign relations.[261] Therefore, a center of gravity situs determination test is consistent with the constitutional underpinnings of the act of state doctrine.

The center of gravity test, however, has one flaw that may make it unsuitable for use as a situs determination test in foreign branch expropriation cases. Because the test provides judges with great flexibility in evaluating the contacts between each interested state and the subject matter of the litigation,[262] the center of gravity test creates more uncertainty and unpredictability than any of the three traditional situs determination tests.[263] The determination of which state has the most significant relationship to the confiscated deposits could become entirely a subjective judicial evaluation of the contacts between the deposit contract and each interested state.[264] In such a situation, situs determina-

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certainty, predictability, and uniformity of result. *Id.* § 6(2)(a)-(e).

257. Auten v. Auten, 308 N.Y. 155, 161, 124 N.E.2d 99, 102 (1954).

258. *See supra* note 248 (demonstrating that United States courts use the center of gravity test exclusively in choice of laws contexts).

259. *See supra* note 80 (explaining the necessity of a United States court to fully understand a foreign state's expectations concerning the subject matter of the litigation).

260. *See supra* note 146-48 and accompanying text (explaining that a United States court that fully appreciates the expectations of a foreign government is unlikely to render a decision hostile to those expectations).

261. *See supra* note 80 and accompanying text (explaining when judicial consideration of a claim will inhibit the ability of the President to conduct foreign relations).

262. RESTATEMENT (SECOND) CONFLICT OF LAWS § 188 (1969).

263. Auten v. Auten, 308 N.Y. 155, 161, 124 N.E.2d 99, 102 (1954) (stating the outcome of the center of gravity test is not predictable).

264. *See* R. LEFLAR, *supra* note 250, at 310 (stating that an unformulated rule exists whereby judges manipulate the center of gravity test to achieve just and moral

tion and, therefore, the applicability of the act of state doctrine would become a matter of judicial discretion. United States banks desire some degree of certainty on the extent of their liability in the event of an expropriation of the foreign branch. An act of state doctrine, which is applicable exclusively upon a subjective determination of a judge, will not facilitate the overseas expansion of United States banks.[265] In this sense, a conflict of laws approach to situs determination would not be an improvement over the current situs tests.

B. LEGISLATIVE RESPONSE TO FOREIGN BRANCH BANK EXPROPRIATIONS

Congressional attempts to alter or eliminate the act of state doctrine, viewed in the context of foreign branch expropriation cases, are inherently flawed and impractical.[266] Such attempts invariably prejudice the interests of United States banks operating foreign branches.[267] Any Congressional restriction on the application of the act of state doctrine must adequately protect the interests of United States banks with foreign branches. A federal statute accompanying congressional restrictions on the act of state doctrine, applicable exclusively in foreign branch expropriation cases, would assure such protections. Congressional adoption of a statute similar to section 138 of the New York banking title[268] would adequately protect the interests of both the United States banks and their foreign depositors.[269] Such a statute would provide a predictable solution, consistent with the constitutional underpinnings of the act of state doctrine.

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results); *see also* Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 172, 175 (implying that sensitivity or receptiveness to a particular claim affects the center of gravity analysis); Weintraub, *supra* note 255, at 413 (stating that the center of gravity test can easily become a numerical test with a court holding that the state with the most contacts to the subject of the litigation has the most significant relationship).

265. *See supra* notes 119-22 and accompanying text (discussing how uncertainty over the application of the act of state doctrine inhibits the international expansion of United States banks).

266. *See supra* notes 202-24 and accompanying text (explaining the flaws in the International Rule of Law Act of 1981); *supra* notes 228-38 (discussing the flaws in the 1985 proposal to amend the Foreign Sovereign Immunities Act of 1976).

267. *See supra* notes 218-24 and accompanying text (discussing how congressional attempts to alter the act of state doctrine denies United States banks, innocent third parties, an affirmative defense in foreign branch expropriation cases).

268. N.Y. BANKING LAW § 138 (McKinney 1971).

269. *See* Letter from J.S. Hutto, Superintendent and Counsel of the New York Banking Department, to Herbert Lehman, Governor of New York (May 16, 1937), *cited in* Heininger, *supra* note 49, at 989 (stating that section 138 would provide "additional protection to banks and trust companies having foreign branches, in the event such branches are seized or nationalized by the government of such country").

Section 138 allows courts to consider the extent of an expropriation in determining the liability of a United States bank to the depositors of its expropriated branch.[270] Section 138 is a two-part regulatory scheme. The first subsection applies only when a foreign government expropriates both the assets and liabilities of a foreign branch.[271] The parent bank then is liable to the same extent as any local banking corporation.[272] Subsection two applies only when a "dominant authority which is not recognized by the United States as the de jure government of the foreign territory concerned"[273] expropriates only the assets of the branch.[274] Where an unrecognized authority confiscates only the assets of the branch, the liability of the parent bank is reduced "*pro tanto* by the proportion that the value . . . of such assets bears to the aggregate of all deposits and contract liabilities of the branch."[275]

In addition to resolving some of the fairness issues involved in foreign branch expropriation cases, federal codification of section 138 would be consistent with the principles underlying the act of state doctrine.[276] A section 138 analysis is unlikely to frustrate the expectations of the foreign government concerning the expropriated deposits. For example, when a foreign government, whether recognized or not, confiscates both the assets and liabilities of the branch, courts would determine the liability of the parent bank in accordance with the laws of the foreign state.[277] Application of this foreign law would be a judicial recognition that the foreign state has the greatest interest in the banking relationship.[278] Therefore, the United States court would endorse, rather than

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270. Comment, Vishipco Line v. Chase Manhattan Bank: *Bank Liability for Foreign Branch Seizures*, 2 ANN. REP. BANKING L. 393, 404-05 (1983).

271. N.Y. BANKING LAW § 138(1) (McKinney 1971 & Supp. 1988).

272. *Id.* The laws of the expropriating country include "all acts, decrees, regulations and orders promulgated or enforced by a dominant authority asserting governmental, military or police power of any kind at the place where any such branch office is located, whether or not such dominant authority be recognized as a de facto or de jure government." *Id.*

273. *Id.* § 138(2).

274. *Id.*

275. *Id.* Where an unrecognized government confiscates only the assets of a branch, section 138(2) reduces the liability of the parent bank according to the following formula:

Depositor's Account Balance × (Branch Assets Lost ÷ Preconfiscation Liabilities)

Comment, *Foreign Branches*, *supra* note 35, at 406. Banks determine the value of the assets lost and the aggregate preconfiscation liabilities of the branch by examining the books and records of the branch at the time of the expropriation. N.Y. BANKING LAW § 138(2) (McKinney 1971 & Supp. 1988).

276. *See supra* notes 75-80 and accompanying text (discussing the underpinnings of the act of state doctrine).

277. N.Y. BANKING LAW § 138(1) (McKinney 1971 & Supp. 1988).

278. Fricke v. Isbrandtsen Co., 151 F. Supp. 465, 467 n.7 (S.D.N.Y. 1957). Fed-

frustrate, the expectations of the foreign state concerning the banking relationship. This endorsement of the expectations of the foreign state would not impair the ability of the President to conduct foreign relations.

Similarly, when an unrecognized foreign government confiscates only the assets of a foreign branch, determining the liability of the parent bank will not frustrate the expectations of the foreign state concerning dominion over the banking relationship. A United States court would accept the validity of the confiscation and examine the books and records of the branch to establish the extent of the parent bank's liability.[279] The validation of the confiscation would be an endorsement of the expectations of dominion of the foreign state over the banking relationship and would not inhibit the President in the conduct of foreign relations.

In foreign branch expropriation cases, section 138 requires a case by case appraisal of the extent of an expropriation.[280] Even though this statute reduces the possibility of unfair results in foreign branch expropriation cases, it is not a problem free solution. Initially, a court must decide which of the two subsections applies. This determination requires a thorough evaluation of the expropriation decrees of the foreign state.[281] Most expropriation decrees, however, do not unequivocally indicate the scope of the expropriation.[282] Where an expropriation decree is ambiguous, a United States court would have few objective guidelines for determining which subsection applies.

Federal codification of section 138 would bring predictability to international banking and would adequately safeguard the interests of United States banks operating foreign branches.[283] United States banks operating branches abroad would no longer have to guess whether a United States court would apply the act of state doctrine to relieve them of liability for the debts of an expropriated branch. A United States bank would be liable only for the amount of nonexpropriated

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eral courts apply the laws of the state that they believe has the greatest interest in the subject matter of the litigation. *Id.*

279. N.Y. BANKING LAW § 138(2) (McKinney 1971 & Supp. 1988).

280. Comment, *Foreign Branches*, *supra* note 35, at 405.

281. *See supra* note 271-72 and accompanying text (explaining that section 138(1) applies to cases in which the foreign government expropriates both the assets and liabilities of the foreign branch); *supra* notes 273-75 and accompanying text (explaining that section 138(2) applies only to cases in which an unrecognized government confiscates only the assets of a foreign branch).

282. *See supra* notes 65-66 (discussing the ambiguous nature of expropriation decrees).

283. *See supra* note 269 and accompanying text (explaining the confusion that the proposed statute will eliminate).

assets it was allowed to maintain in the foreign county.[284] Because it would allow a consistent to approach international banking, federal codification of section 138 would facilitate overseas expansion of United States banks.

CONCLUSION

The traditional situs determination tests for the act of state doctrine do not provide a precise measurement of a foreign government's expectations regarding property at issue before United States courts. A situs determination test reflecting conflict of laws principles would remedy this situation. The lack of certainty and predictability inherent in such a situs test, however, may render it unworkable in foreign branch expropriation cases. Additionally, the traditional inability of the United States courts to agree on a single test supports the abandonment of situs determination in foreign branch expropriation cases. Federal codification of section 138 of the New York banking code would provide a viable alternative to the act of state doctrine in foreign branch expropriation cases.

284. N.Y. Banking Law § 133(2) (McKinney 1971 & Supp. 1988).